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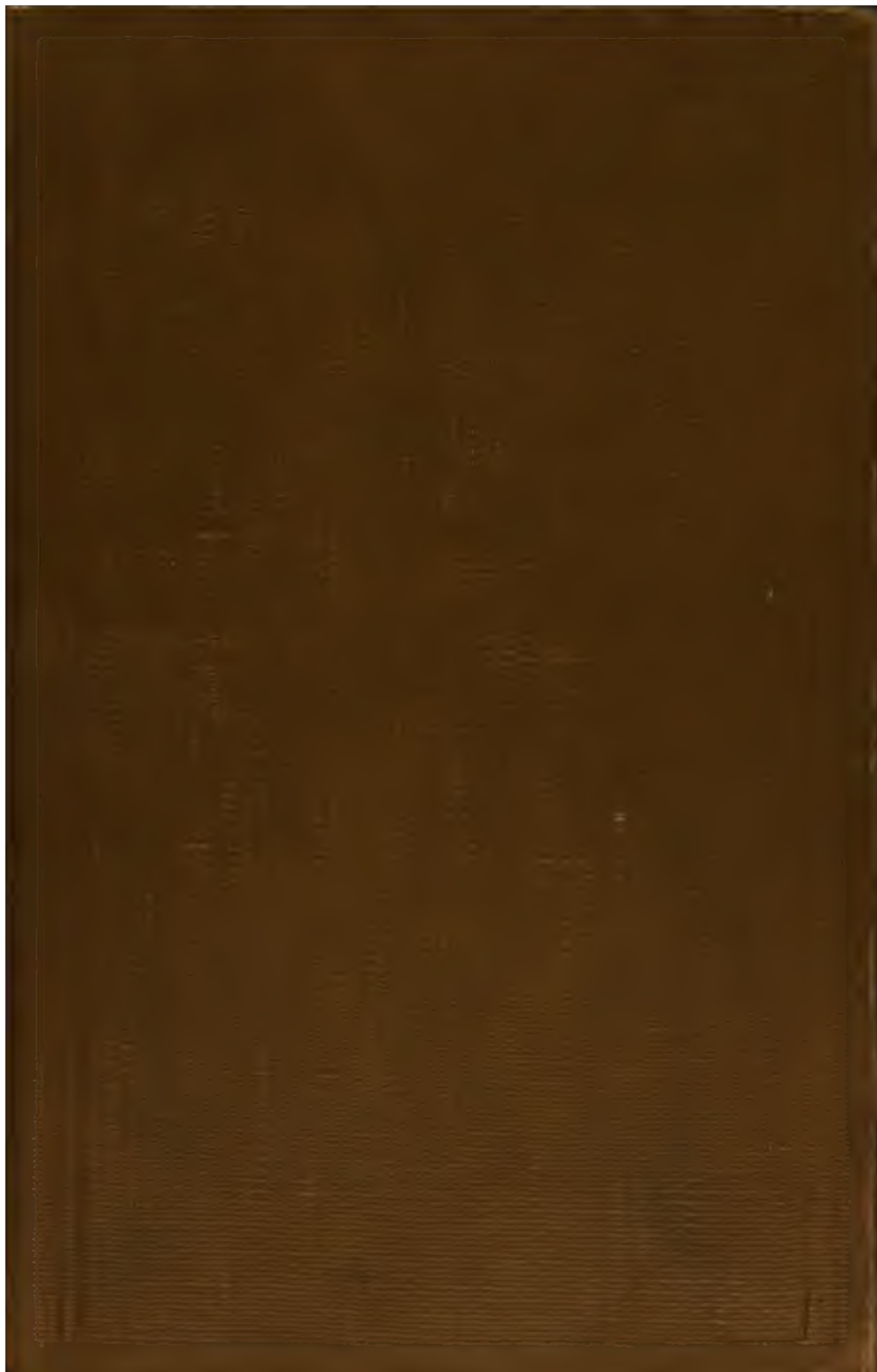
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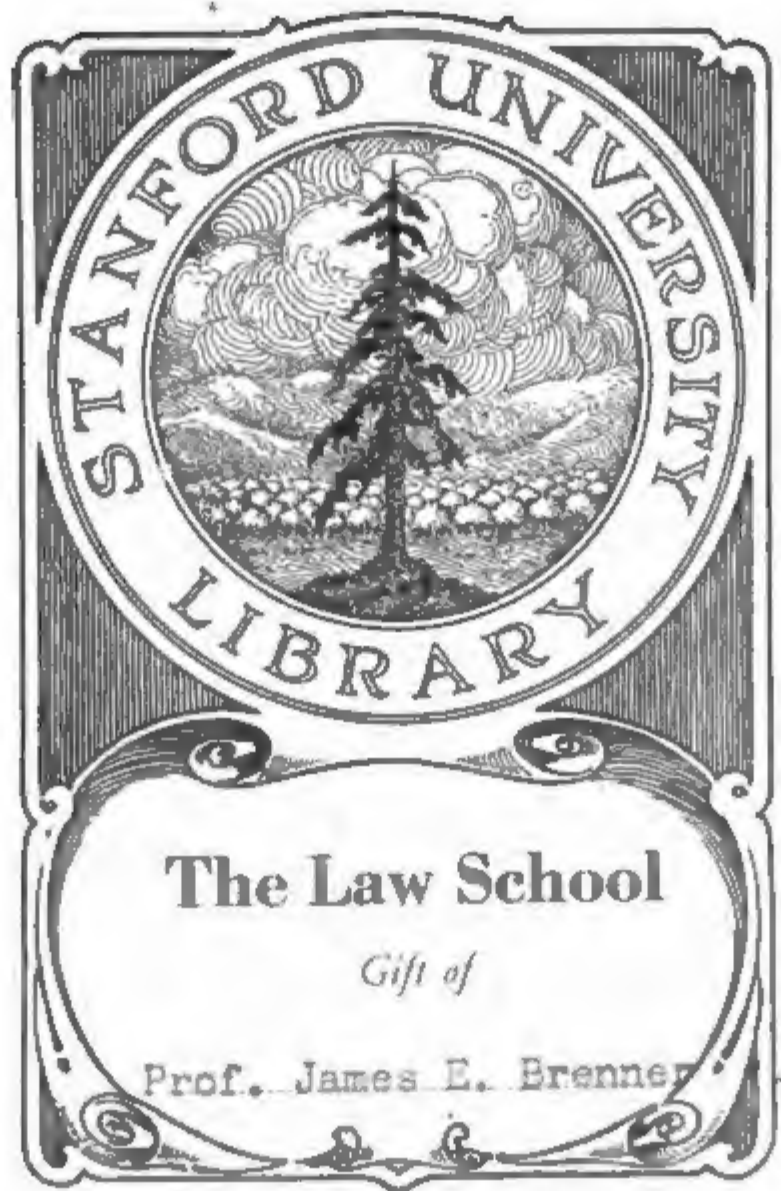
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James E. Brenner



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HANDBOOK
OF
THE LAW OF WILLS

By GEORGE E. GARDNER
PROFESSOR OF LAW IN THE BOSTON UNIVERSITY SCHOOL OF LAW

SECOND EDITION

By WALTER T. DUNMORE
PROFESSOR OF LAW
IN THE WESTERN RESERVE UNIVERSITY LAW SCHOOL

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1916

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(GARD. WILLS, 2d Ed.)

*The Author takes great pleasure in dedicating
this book to the
Honorable LOUIS CARVER SOUTHARD
of the Boston Bar*

(x)°

PREFACE TO SECOND EDITION

THE first edition was so broad in scope that it has seemed unwise to deal with entirely new topics. In connection with the topics dealt with in the first edition, the editor has sought primarily to consider those cases which have been decided in the twelve years which have elapsed since the publication of that edition. Some changes and a large number of additions have been made, especially in the notes. Many cases in support of new text have been referred to, and a considerable number of recent cases have been cited, because they contain valuable discussions or deal with matters which are still in dispute. Although realizing that defects in general statements are unavoidable, the statements in the black-letter text have usually been retained, but the fact that the authorities are in conflict has been made clear in many instances where this did not appear in the former edition.

W. T. D.

CLEVELAND, February 8, 1916.

(vii)

PREFACE TO FIRST EDITION

THIS book embodies an attempt to express clearly and concisely the law of wills, together with a general discussion of their probate. It is hoped that its statements are sufficiently clear to commend the work to students, and that the full citation of authorities—for it is believed that no case decided in the last fifteen years in any court of last resort in the United States genuinely illustrative of a principle has been overlooked—may render the book serviceable to practitioners. The work is the result of the study of the leading decisions of whatever time and all the modern cases. Professor Bigelow's little book on Wills displays the usual acumen and insight of that learned author, and has been read much to my profit. Whatever direct indebtedness I am under to this and other works has been carefully indicated in the notes. When the discussion of legal theory has promised profit, I have attempted it. A clear statement of the law of wills, however, reveals in most instances its ultimate foundation. While the general plan of the work is mine, the minuter subdivisions are largely those of the American Digest.

G. E. G.

Boston, October 28, 1903.

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SECOND EDITION

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2. History.
3. Gifts Causa Mortis and Gifts by Will Distinguished.
- 4-5. Tests to Determine the Character of the Instrument.

DEFINITIONS

1. A will is the expression, in the manner required by law, and operative for no purpose until death, of that which one may lawfully require to be done after his death.

It is a matter of some difficulty to frame a definition which shall be broad enough to include every species of will, and which shall yet possess sufficient definiteness to make it of much practical significance and value. Still a definition which purports to be anything more than a partial definition or an enumeration of particulars should effect at least this much: It should cover the ground which the term undertaken to be defined covers in its concrete application, and it should yield, after reasonable consideration, some fairly definite notion as to the scope of the term. In other words, a really adequate definition of any legal term will at once commend itself to the lawyer as comprehending neither too much nor too little, while to the student it will convey some definite conception of its reach.

Since nearly all wills dispose of property, the above definition is in a measure open to the criticism that it does not place sufficient emphasis upon the dispositive function of a will.

A more generally received definition is as follows: "A will is an instrument by which a person makes a disposition of his property to take effect after his decease, and which is, in its own nature, ambulatory and revocable during his life."¹ This definition is inadequate. It describes some wills, and wills with which books on that subject commonly deal. But it does not describe all wills. A will is not always an instrument; it may be oral or nuncupative. A will may make no disposition of property. An instrument, duly executed, and which merely appoints an executor, without directions as to what he shall do, is a valid will,² as is also an instrument by which a father appoints a guardian for his minor child, the appointment to take effect upon the death of the father.³ Some other much used definitions are open to the same objections: "A will is a disposition, made by a competent testator, in the form prescribed by law, of property over which he has legal power of disposition, which disposition is of such a nature as to take effect at the death of the testator."⁴ "A last will and testament may be defined as the disposition of one's property to take effect after death."⁵ "An instrument by which a person makes a disposition of his property to take effect after his decease."⁶ "The term 'will' includes every kind of testamentary act, taking effect from the mind of the testator, and manifested by an instrument in writing."⁷

But there are approved definitions which approximate to and support the definition given in the black-letter text. "The legal declaration of a man's intention, which he wills to be performed after his death."⁸ "A just sentence of our will touching that we would have done after our death."⁹ Perhaps, after all, it is needless, if not impossible, to undertake to improve upon the definition of

¹ 1 Jarman on Wills, p. *18.

² In re Hickman's Estate, 101 Cal. 609, 36 Pac. 118; In re John's Will, 30 Or. 494, 47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242; Brownrigg v. Pike, L. R. 7 P. D. 61; In re Lancaster, 1 Sw. & Tr. 464; 1 Williams on Executors, 267, 204.

³ Schoul. Dom. Rel. § 287; Wardwell v. Wardwell, 9 Allen (Mass.) 518; Stringfellow v. Somerville, 95 Va. 701, 29 S. E. 685, 40 L. R. A. 623.

⁴ Bouvier's Law Dict. sub. "Will."

⁵ 1 Redf. Wills, 5.

⁶ Cover v. Stem, 67 Md. 449, 10 Atl. 231, 1 Am. St. Rep. 406; Wilks v. Burns, 60 Md. 68; Younger v. Duffie, 94 N. Y. 539, 46 Am. Rep. 156.

⁷ Bayley v. Bailey, 5 Cush. (Mass.) 245; Kelleher v. Kernan, 60 Md. 440. This definition is faulty in two particulars: It calls for a writing, which is not always an essential, while it is necessary to know what a will is in order to know what a "testamentary" act is.

⁸ 2 Bl. Comm. *499 (taken from the civil law). See, also, Frew v. Clarke, 80 Pa. 170; Colton v. Colton, 127 U. S. 309, 8 Sup. Ct. 1164, 32 L. Ed. 138; Smith v. Bell, 6 Pet. 75, 8 L. Ed. 322.

⁹ 1 Redf. Wills, 5. Aside from the use of the word undertaken to be de-

Swinburne, for which he was indebted to the Civil Law: "A last will is a lawful disposing of that which any one would have done after death."¹⁰ There is now no legal distinction between the words "will" and "testament." Until recent times, however, the term testament was applied particularly to wills of personal property, requiring an executor. Testament was the broader term, including wills of both realty and personalty, the term "will" being more strictly applicable to the former,¹¹ by which no executor need be appointed, while the naming of an executor came to be regarded as requisite to the validity of a testament of personal property.¹² This distinction has, however, long since disappeared.¹³ The commonly used expression, "last will and testament," is therefore pleonastic.

Other Terms Defined

It seems desirable, at the outset, to define the other common terms used in connection with the law of wills.

A "testator" is a man who has made a will or testament. When disposing of real property by will, he is sometimes called the "devisor."

A "testatrix" is a woman who has made a will or testament.

A "codicil" is a supplement to a will, or an addition made by the testator, and annexed to, and to be taken as a part of, a will, by which its dispositions are explained, added to, or altered.

"Devisee" is one who takes real property under a will.

"Legatee" is one who takes personal property under a will.

So far, however, as the legal effect is concerned, these words may be used by testators interchangeably.

A "devise" is real property passing under a will.

A "legacy" is money passing under a will.

A "bequest" is any form of personal property passing under a will.

So far, however, as the legal effect is concerned, these terms may be used interchangeably.¹⁴

defined in the definition itself, and giving to the word "just" its full effect, this definition would appear to be adequate.

¹⁰ Swinburne, Wills, p. 11.

¹¹ 4 Burn, Ecc. Law, 53; 1 Swinb. 3, 4.

¹² 2 Bl. Comm. *500; Swinburne, Wills, pt. 1, c. 1, pl. 19; Woodward v. Lord Darcy, Plow. 165.

¹³ Smith v. Smith, 168 Ill. 488, 48 N. E. 96; Wyrall v. Hall, L. R. 2 Ch. 112; Underhill, Wills, § 6.

¹⁴ Evans v. Price, 118 Ill. 593, 8 N. E. 854; White v. Mass. Institute Technology, 171 Mass. 84, 50 N. E. 512; Allen v. White, 97 Mass. 504; Lamb v. Lamb, 131 N. Y. 227, 30 N. E. 133; In re White, 125 N. Y. 544, 26 N. E. 909; Clarke v. Clarke, 46 S. C. 230, 24 S. E. 202, 57 Am. St. Rep. 675.

A "holographic" or "olographic" will is one which is written entirely by the testator and signed by him.¹⁵

A "mystic will" is a will signed by the testator himself, sealed, and delivered to a notary in the presence of three witnesses, accompanied by the testator's declaration that it is his last will. The notary is then required to indorse upon the envelope containing the will a statement of all the facts attending the transaction, and this is to be signed by him and the witnesses.¹⁶

A "nuncupative will" is an oral will, which is valid under certain circumstances.¹⁷

HISTORY

2. The history of wills in England is naturally divided into three periods:

- (a) The period preceding the Norman Conquest.
- (b) The period succeeding that Conquest.
- (c) The period under modern statutes, beginning with the statute of wills.

The development of wills in England has directly determined their history in the United States.

Among all nations which have attained to any degree of civilization, the power of the owner of property to exercise some control over its disposition after his death has apparently been recognized, or, it might be better said, granted, either by legislation or usage. With the civilized man's appreciation of the value and significance of property, there comes a natural concern as to its disposition after his death. The state, as such, is also concerned in its peaceable and orderly disposition; for if this disposition were not determined or if the power to determine it were not lodged somewhere, a man's deathbed would be the scene of an unseemly and riotous scramble for the possession of his effects—or, at least, the struggle would barely be postponed until after the funeral. Hence the state has either of itself determined the disposal of the property of the deceased, or has, with various and varying limitations and restrictions, empowered the owner of property to determine its disposal. In other words, we have statutes for cases of intestacy, and statutes or usage conferring a more or less limited testamentary power upon the owner of property.

¹⁵ In *re* Pearsons' Estate, 99 Cal. 30, 33 Pac. 751; Succession of Robertson, 49 La. Ann. 868, 21 South. 586, 62 Am. St. Rep. 672.

¹⁶ Civ. Code La. arts. 1584, 1587. This form of will is apparently recognized only in Louisiana, whose legislation in this as well as in other particulars is based upon the Code Napoleon.

¹⁷ See post, p. 44.

It being now well settled that intestate inheritance is a more ancient institution than testamentary succession,¹⁸ the question as to how testamentary power came to be conferred upon the possessor of property is at once suggested. No certain answer can be given, because evidence of the existence or at least of the nature of testamentary power in archaic communities is almost wholly lacking. Indeed, in the opinion of Sir Henry Maine, it is doubtful whether a true power of testation was known to any ancient society except the Roman.¹⁹ The reason for this is obviously twofold. In all primitive communities the family is the social unit. The modern relation of man to man has very gradually replaced the primitive relations of the individual to his family and of families to each other.²⁰ Indeed, it may be doubted if the archaic man ever consciously disassociated himself from the family of which he was a part. If this be so, the conception of a testamentary power which might serve to transfer the property of an individual from his family to a stranger would be slow to develop. Moreover, the idea of a power by which the will of a person may direct and control the disposition of his property after death would be far beyond the comprehension of archaic man. But, with the failure of persons who were entitled to inherit by right of blood, a concrete problem was presented: What was to become of the dead man's property? The whole social instinct forbade that it should become vacant, and thus fall to the lot of him who could fight most strenuously for its possession.²¹ The power of lawful disposition must be reposed somewhere. And thereupon, it seems, testaments were first allowed when there was failure of inheritable blood on the part of the persons making them.²² Hence the development was easy to a complete scheme for the disposal of the goods of the deceased, when there was neither testament nor persons entitled to the inheritance by right of blood.

Wills of Real Property in England

Prior to the Norman Conquest, book land, i. e., land the grant of which was evidenced by a book or charter,²³ was apparently always

¹⁸ Maine, *Ancient Law*, c. 6, p. 189.

¹⁹ *Id.*

²⁰ *Id.* c. 6, p. 179.

²¹ Bigelow on Wills, pp. 10, 11.

²² Maine, *Anc. Law*, c. 6, p. 191.

²³ It is generally expressed in the charter that the grantee may grant the land away to whomsoever he pleases in his lifetime, or leave it by his last will, and, if not so disposed of, it is to descend to his representatives. These powers, however, appear to have depended upon the form of the gift as expressed in the charter. The power of alienation might have been restricted so that the land could not be granted away from the kindred, or the descent of the land might be confined to lineal descendants, or to heirs male or female. In these respects it was a principle of Anglo-Saxon customary law that the

alienable by will, unless forbidden by the terms of the grant,²⁴ though it is doubtful whether a man who had no heir land²⁵ to leave to his relatives could dispose of all his book land so as to disinherit them entirely.²⁶ In process of time, too, wills of heir land appear to have become established, though it is not likely that a testator could entirely disinherit his near relatives.²⁷

Apparently, then, during the Anglo-Saxon period, freedom of testamentary disposition over land had been established,²⁸ except so far as it was limited by the terms of the grant to the testator and by the claims of his family, though to what extent the latter operated is unknown.²⁹ It has been thought that wills were in common use during this period,³⁰ but the most careful modern scholars incline to the view that they were generally resorted to only by the nobles, and that the middle and lower classes seldom availed themselves of the right.³¹

Wills of Land under the Feudal System

With the introduction of the feudal system into England, as a result of the Norman Conquest, the power of disposing of lands by will rapidly disappeared, with the exception of a few localities in which the feudal tenures did not prevail.³² Aside from these localities, the right had completely disappeared by the middle of the thirteenth century.³³ There was a twofold reason for this. The

nature and extent of the rights of the grantee depended upon the form of the gift." Digby, *Real Prop.* (3d Ed.) 14.

²⁴ Laws of Alfred, c. 41, quoted in Stubbs, *Select Charters*, 62.

²⁵ Land received by inheritance, and possibly all land, aside from book land.

²⁶ Glanville, lib. 7, c. 1; Potts on Law of Succession, 10.

²⁷ Glanville, *supra*.

²⁸ 2 Bl. Comm. *491.

²⁹ Potts, *Law of Succession*, 11.

³⁰ Blackstone, *supra*.

³¹ Pollock & Maitland, *Hist. of Eng. Law*, vol. 2, pp. 318, 320. The same authors are inclined to doubt the revocability of a will during this period. They also think that in many cases the consent of the king was essential to the validity of the will. *Id.* 318, 319.

³² Such was the case with lands held by gavelkind tenure in the county of Kent. The peculiarities of this tenure, if, indeed, it may fairly be called a tenure at all, show it to have been an ancient method of land holding which had withstood the radical changes resulting from the Conquest. It will be recalled that lands thus held descended to all the sons equally, that they could be alienated by the owner at the age of fifteen, that they did not escheat by reason of attainder for felony, and that they could be devised. 2 Bl. Comm. *84.

³³ Pollock & Maitland, *Hist. of Eng. Law*, vol. 2, p. 27. The survival of the power to devise to this period was influenced by the potency of the *forma doni*. Emphasis was given to the fact that feoffee had been granted a testamentary power denied by the common law. *Id.* pp. 26, 27.

right of the tenant in fee to alienate by a conveyance had been established with difficulty, and, when recognized, could be exercised, in the case of lands held in knight service, only upon the payment of a fine.⁸⁴ There was no disposition to extend this power of alienation. Moreover, the power to devise would have militated against the lord's right of escheat in event of failure of the blood of the tenant, of wardship in event of the heir's minority, with its attendant right to the rents and profits of the estate, and against his power to dispose of such ward in marriage.⁸⁵ In a word, testamentary power meant the possibility of defeat of all those rights pertaining to the lord as against the heir of his deceased tenant. Naturally it was therefore denied. Again, there was a technical, but none the less conclusive, reason, why a freehold could not be disposed of by will under the system of conveyancing that came with the feudal system. The will, as affecting real property, was regarded as a conveyance, and such was indeed its nature. It operated to pass the title of the devisor, immediately upon his death, to the devisee. The legal title to no freehold could pass, save by livery of seisin. But this was an open and public act, by the grantor, amounting in substance to a delivery of land to the grantee.⁸⁶ Obviously, a dead man could make no livery of seisin.

But no rapidly developing community would long dispense with testamentary power, particularly when the demand therefor was accentuated by the development of the principle of primogeniture, and the consequent desire on the part of the father to be able to make some provision for the younger children. From the reign of Henry V (1413-1422) to the enactment of the statute of uses, in 1535, lands were freely disposed of by will through the medium of a use. In the reign of this king, the court of chancery intervened to protect the beneficial interest of a person to whose use land was conveyed to another. These uses, being thus the creatures of chancery, were neither fettered by nor subject to the feudal rules which governed legal estates in land. No livery of seisin was necessary to

⁸⁴ 2 Bl. Comm. *71.

⁸⁵ Id. *66 et seq.

⁸⁶ "Livery of seisin, by the common law, is necessary to be made upon every grant of an estate of freehold, whether of inheritance or for life. * * * Livery of seisin is either in deed or in law. Livery in deed is thus performed: The feoffor, lessor, or his attorney, together with the feoffee, lessee, or his attorney, come to the land, and then, in the presence of witnesses, declare the contents of the feoffment or lease on which livery is to be made, and then the feoffor doth deliver to the feoffee * * * a clod, or turf, or a twig, or bough there growing, with words to this effect: 'I deliver these to you in the name of seisin of all the lands and tenements contained in this deed.'

"Livery in law is where the same is not made on the land, but in sight

transfer the title to a use. In fact, no livery was possible from the very nature of the subject-matter. Hence the interest in a use could be transferred by will, and a deviser could determine by will the uses to which land should be held, the rights of the parties thus beneficially interested being protected by the court of chancery. If A. wished to devise land which he held in fee, and yet to retain the advantage of it during his own life, he had merely to convey the land to B., "to hold to the use" of himself (A.) during his life, and then to such uses as he should declare by his last will and testament. B. thus had the legal title, but A.'s beneficial interest would be enforced during his life. He could make his will at his leisure, alter it as frequently as he might wish, and upon his death B. would hold the land to such uses as A.'s will might set forth. Or the possessor of a use might dispose of it directly by will. Thus, to continue the illustration, if A. should, by will, direct that B. hold the lands conveyed to him by A., to the use of C. and his heirs, C., upon the vesting of his interest in the use, could, by will, directly transfer his beneficial interest to such person as he might choose to designate.³⁷

Thus men could freely devise their lands by resorting to the use, until the temporary destruction of uses by the statute of uses.³⁸ Owing to the various abuses to which uses had been put,³⁹ this statute was carefully framed, with a view to the utter destruction of uses by uniting the legal and beneficial estates, i. e., the estates of the feoffee to uses and of the cestui que use, in the latter. The use was thus, by force of the statute, converted into the legal estate, with all its feudal incidents and restrictions.

The history of how the statute ultimately was thwarted and almost wholly failed of its object does not belong here. For a time, however, it was effective, and testamentary dispositions of land were no longer possible. But the demand for this right was too strong to be resisted, and in 1540, five years after the passage of the statute of uses, the statute of wills was enacted,⁴⁰ by which power was given to tenants in fee simple to dispose by will of all their lands held by socage tenure, and two-thirds of those held by knight service; but the rights to primer seisin, relief, and fines on alienation, in the case of socage lands, and of wardship over the third part of knight service lands, were preserved in favor of the King

of it only, the feoffor saying to the feoffee: 'I give you yonder land; enter and take possession.'" 2 Bl. Comm. *315, *316.

³⁷ In cases illustrating this method of devising, see *Royal Wills*, 234, 236 (reported in full in *Big. Wills*, 25, 26). See, also, Digby, *Hist. Real Property*, 261.

³⁸ 27 Hen. VIII, c. 10 (1535).

³⁹ See 2 Bl. Comm. *331, for an enumeration of them.

⁴⁰ 32 Hen. VIII, c. 1; interpreted by 34 & 35 Hen. VIII, c. 5, § 3.

or other lord. Finally, by the act for the abolition of military tenures,⁴¹ tenure by knight service was turned into free and common socage, and from this time free power of testamentary disposition over land was established in England.

Wills of Personal Property

The history of wills of personal property is less complicated. Power to dispose of such property, to an extent at least, appears to have existed from the earliest Anglo-Saxon period in English history.⁴² Under the description of property so disposable were included not only goods and chattels, but also terms of years and all chattel interests in land.⁴³ Whether this power extended to the disposal of the whole of the personal property, prior to the Norman Conquest, is uncertain. At all events, in Glanville's time, during the reign of Henry II,⁴⁴ considerable restraint was imposed. If a man had a wife and children, he could dispose by will of one-third of his personal property. At his death his widow took one of the remaining thirds, his children the other. If he had children, but no wife, or a wife and no children, he could dispose of one half of his personal property, the widow or children taking the other half. Without wife and children, he could dispose of the whole.⁴⁵ The shares of the wife and children were called their reasonable parts, and the writ de rationabili parte bonorum lay to recover them,⁴⁶ it being maintainable against the executors, founded upon a complaint that they unjustly detained from the plaintiff the reasonable part of the goods and chattels which were of the deceased, and refused to render the same.⁴⁷ This limitation was recognized by Glanville as a general rule of the common law,⁴⁸ and seems to have been usually so regarded as late as the reign of Charles I,⁴⁹ although Coke viewed it as nothing but a local custom.⁵⁰ At all events, after this reign the limitation disappeared, though the process cannot be traced,⁵¹ a fact which rather tends to support Coke's view of the matter.

The testator was also bound to give his best and principal chattel to his lord, and to bequeath something to the church.⁵² The former, as a heriot, may perhaps have been claimed by the lord prior to the

⁴¹ 12 Charles II, c. 24 (1660, A. D.).

⁴² 1 Williams, *Executors*, 1; Croswell, *Executors & Administrators*, 4; 2 Bl. Comm. *491.

⁴³ Co. Litt. 111b.

⁴⁴ 1187, A. D.

⁴⁵ Glanville, lib. 2, c. 5. See, also, 2 Bl. Comm. *491.

⁴⁶ 2 Saund. 66, note (9).

⁴⁷ F. N. B. 122 L. (9th Ed.); Co. Lit. 176b, note (3), by Hargrave.

⁴⁸ Glanville, lib. 7, c. 5.

⁴⁹ Finch, 175.

⁵⁰ 2 Inst. 83; Co. Lit. 176b.

⁵¹ 2 Bl. Comm. *492.

⁵² Glanville, lib. 7, c. 5.

Conquest,⁵³ and in some manors the custom is said still to exist.⁵⁴ Bequests to the church have, of course, long since ceased to be obligatory.⁵⁵

Wills in the United States

The feudal system was never recognized as part of the common law in the United States, and it has therefore had no effect upon questions of testamentary power in this country. With limitations, to be discussed in the course of this work, the power to dispose of both real and personal property is conferred by statute upon persons of age and having sufficient capacity for that purpose. These statutes have been largely based upon English legislation, and, in general, our law of wills rests upon that of England, except in those few jurisdictions which have come under the influence of the civil law.

GIFTS CAUSA MORTIS AND GIFTS BY WILL DISTINGUISHED

3. A gift causa mortis is distinguished from a gift by will in the following particulars:
 - (a) A gift causa mortis may be made orally; an instrument in writing is ordinarily required in the case of a will.
 - (b) A gift causa mortis must be made under apprehension of impending death; a will is commonly made in view of the fact of death, but not because of its immediate proximity.
 - (c) Delivery is essential to the validity of a gift causa mortis, and the donee acquires title directly from the donor. No delivery is ever had of property which is the subject of gift by will until after the death of the testator, and the legatee's title is derived from the executor.
 - (d) Real estate cannot be the subject of a gift causa mortis. A will may of course dispose either of realty or of personalty.

A gift causa mortis has been described as a gift, either direct or in trust, of something the property in which can and actually does pass by mere delivery, made by a person in his last sickness, or apprehensive of approaching death, but to take effect only on that event happening at or about the time anticipated, or within a reasonable time afterwards, and provided there be no revocation of the gift by the donor's recovery and his subsequent resumption thereof.⁵⁶ More briefly, a gift causa mortis is a gift of personal property,

⁵³ Canute, cc. 71, 72; Stubbs, *Select Charters*, 74.

⁵⁴ Williams, *Real Prop.* (16th Ed.) 420.

⁵⁵ Potts on *Succession*, 20.

⁵⁶ Flood, *Wills Per. Prop.* 2, cited in Thornton on *Gifts*, § 19.

made by the donor under apprehension of impending death, effectuated by delivery, and defeasible by resumption thereof by the donor, his recovery from that which occasioned his apprehension, or by the prior death of the donee.⁵⁷ The gift may be revoked by a resumption of possession by the donor, though this be done without the knowledge or consent of the donee.⁵⁸ It is not, however, essential to the revocation, that the donor again acquire the actual possession of the property.⁵⁹

Gift may be Made Orally

While a gift causa mortis may be accompanied by a writing, and may be made effectual in some jurisdictions by the delivery of the writing alone,⁶⁰ yet no writing is necessary to its validity.⁶¹ While originally it is likely that oral wills of personalty were valid, yet, in consequence of legislation, all wills, with the exception of nuncupative wills, must be contained in a writing, executed in a prescribed manner.⁶²

Apprehension of Death

It is essential to the validity of a gift causa mortis that the donor be, at the time of making it, under the belief that he is in peril of death, or surrounded by threatened dangers which give rise to an

⁵⁷ This definition, it will be observed, makes the gift defeasible upon a condition subsequent. The view of the civil law was that one species of gift was of the nature of a legacy to the extent that the title did not pass until the death of the donor, i. e., that the vesting of the title was dependent upon the condition precedent of the donor's death. See Smith's Equity, 528. And the English courts have apparently taken this view of all gifts causa mortis. *Edwards v. Jones*, 1 Myl. & Cr. 226; *Duffield v. Elwes*, 1 Bligh (N. S.) 497, 534.

But the definition is based upon the more generally recognized American doctrine. See *Daniel v. Smith*, 64 Cal. 346, 30 Pac. 575; *Devol v. Dye*, 123 Ind. 321, 24 N. E. 246, 7 L. R. A. 439; *Marshall v. Berry*, 13 Allen (Mass.) 43, 46; *Parish v. Stone*, 14 Pick. (Mass.) 198, 25 Am. Dec. 378; *EMERY v. CLOUGH*, 63 N. H. 552, 4 Atl. 796, 56 Am. Rep. 543, *Dunmore Cas. Wills*, 1; *Nicholas v. Adams*, 2 Whart. (Pa.) 17.

⁵⁸ *Merchant v. Merchant*, 2 Bradf. Sur. 432.

⁵⁹ *Doran v. Doran*, 99 Cal. 311, 33 Pac. 929; *Adams v. Atherton*, 132 Cal. 164, 64 Pac. 283.

⁶⁰ *Gaunt v. Tucker's Ex'rs*, 18 Ala. 27; *Ellis v. Secor*, 31 Mich. 185, 18 Am. Rep. 178; *Kenistons v. Sceva*, 54 N. H. 24; *Ward v. Turner*, 2 Ves. Sr. 431, 439.

In early times, however, a gift could not be made by writing, where the latter took the place of the manual tradition of the thing itself, *Tate v. Hilbert*, 2 Ves. Jr. 120. And there is modern authority for the view that, in addition to the writing, there must be a delivery of the thing given. See *McGrath v. Reynolds*, 116 Mass. 566; *Smith v. Downey*, 38 N. C. 268.

⁶¹ *Fite v. Perry*, 8 Cal. App. 85, 96 Pac. 102; *Vosburg v. Mallory*, 155 Iowa, 165, 135 N. W. 577, Ann. Cas. 1914C, 880.

⁶² See post, p. 30.

immediately existing apprehension of death.⁶³ Otherwise, we have an ineffectual attempt to make a will or an abortive gift *inter vivos*.⁶⁴ It is not, however, essential to the validity of a gift *causa mortis* that the donor be in *extremis*.⁶⁵ While wills are frequently made in *extremis*, they derive no additional validity from that fact; it is immaterial whether or no there is apprehension of impending death on the part of the testator.

Delivery Essential to Validity of Gift

In the case of all gifts, a delivery of the thing given is essential to their validity.⁶⁶ "From the nature of the *donatio*, it is apparent that the infallible test, which must distinguish it from a testamentary gift, is delivery—change of dominion in *præsenti*. Without this, there is really nothing to distinguish it from an ordinary testamentary bequest."⁶⁷ But, in the case of a legacy, there is no delivery by the testator, and no title passes to the legatee directly from him. The legatee obtains possession of the subject-matter of the legacy, as well as the title, from the executor, but the latter has nothing to do with a gift. The gift is claimed against the executor; the legacy is claimed from him.⁶⁸

It is commonly said that a gift *causa mortis* cannot be revoked by a subsequent will of the donor, for the reason that it is only perfected by the donor's death, and that this event cannot both effectuate and nullify the gift at the same time.⁶⁹

⁶³ Thornton on Gifts, citing *Gass v. Simpson*, 4 Cold. (Tenn.) 288, 298; *Parthrick v. Freind*, 2 Colly. 362, note 6.

⁶⁴ *Parcher v. Institution*, 78 Me. 470, 7 Atl. 266; *Craig v. Kittredge*, 46 N. H. 57; *Kenistons v. Sceva*, 54 N. H. 24; *Gourley v. Linsenbiger*, 51 Pa. 345.

⁶⁵ *Larrabee v. Hascall*, 88 Me. 511, 34 Atl. 408, 51 Am. St. Rep. 440; *Ridden v. Thrall*, 125 N. Y. 572, 26 N. E. 627, 11 L. R. A. 684, 21 Am. St. Rep. 758.

⁶⁶ Thornton on Gifts, § 131.

In some jurisdictions the delivery must be for the express purpose of consuminating the gift, and a previous possession by the donee will not suffice. *Drew v. Hagerty*, 81 Me. 231, 17 Atl. 63, 3 L. R. A. 230, 10 Am. St. Rep. 255. But there seems to be no good reason why the law should require the idle ceremony of a surrender by the donee, so that it may be redelivered to him by the donor. *Davis v. Kuck*, 93 Minn. 262, 101 N. W. 165.

⁶⁷ *Trenholm v. Morgan*, 28 S. C. 268, 5 S. E. 721. So merely saying, "I give you my money in the savings bank," without a delivery of the deposit book, does not effect a gift. *French v. Raymond*, 39 Vt. 623.

See, also, on general question of necessity of delivery, *Meach v. Meach*, 24 Vt. 591; *Ward v. Turner*, 2 Ves. Sr. 431.

As the subject of gifts does not belong properly to a treatise on wills, it is only touched upon incidentally here, for the purpose of pointing out the distinction between a gift and a legacy.

⁶⁸ Flood on Wills of Personal Property, 21; EMERY v. CLOUGH, 63 N. H. 552, 4 Atl. 796, 56 Am. Rep. 543, Dunmore Cas. Wills, 1.

⁶⁹ EMERY v. CLOUGH, 63 N. H. 552, 4 Atl. 796, 56 Am. Rep. 543, Dunmore

The most striking resemblance between a gift causa mortis and a legacy is in their common ambulatory character. Neither takes entire effect until the death of the giver, and each may be revoked before his death.

Realty Not Subject of Gift

"The law of gifts causa mortis, which recognizes a transfer of personal property by a title conditional upon the death of the donor, is, in the nature of things, inapplicable to the transfer of title to real property."⁷⁰

TESTS TO DETERMINE THE CHARACTER OF THE INSTRUMENT

4. Leaving aside questions regarding execution, the test to determine whether an instrument is a will is the presence of testamentary intent—the animus testandi. This consists of an intention to appoint an executor, or a guardian for minor children, or to make some positive disposition of property, this appointment or disposition to take effect, in no way, until the testator's death.
5. To determine whether the instrument discloses an animus testandi, two tests are resorted to:
 - (a) Whether it operates to create any interest prior to the death of the maker.
 - (b) Whether it is revocable by the maker.

Every expression of intent, although the intent thus expressed is not to operate until the death of the person entertaining it, is not the expression of a testamentary intent.⁷¹ A testament, aside from the appointment of an executor or guardian, must make some positive disposition of the maker's property. If it fails to do this, it fails of being a testament. Thus, where a paper in the form of and purporting to be a will, and revoking all former wills, provided that one of the maker's sons should have no part of his estate at his death, giving as a reason that this son had inherited from his mother a sum equal to that which the maker's estate would probably pay to his other legal heirs, but named no executors and contained no other

Cas. Wills, 1; Jones v. Selby, Finch, 300 (quære); Hambrooke v. Simmons, 4 Russ. 25 (quære); Johnson v. Smith, 1 Ves. Sr. 314.

⁷⁰ Reeves v. Howard, 118 Iowa, 121, 91 N. W. 896. Accord: Wentworth v. Shibbes, 89 Me. 167, 36 Atl. 108; Meach v. Meach, 24 Vt. 591.

⁷¹ An assignment of a life insurance policy is not testamentary merely because payment is not to be received by the assignee until after the death of insured. Southern Mut. Life Ins. Ass'n v. Durdin, 132 Ga. 495, 64 S. E. 264, 131 Am. St. Rep. 210.

provisions, it was held not to be a will, and the property was distributed according to the statute of distributions, the son referred to taking his share along with the others.⁷² So a paper merely expressing the wish of the signer that after her death certain persons "raise" her children is not a will.⁷³ And the same rule determines that an instrument expressing a wish for cremation is not testamentary in its character.⁷⁴

The intention to create a testamentary disposition of property must exist at the time the writing is made. For this reason it has been held that where the maker, after properly executing an instrument as a will, had placed at the top the words, "This is not meant as a legal will, but as a guide," the instrument was not entitled to probate.⁷⁵ In brief, such an instrument discloses no final testamentary intent. Hence, in general, all memoranda containing mere advice regarding the disposition of property, or indicating that they were made simply as preliminary to the drawing of a will, are not, of themselves, valid wills.⁷⁶

Testamentary Phenomena Without Testamentary Intent

Although an instrument be drawn up in regular form as a will, and appear to have been executed as such, i. e., though all the testamentary phenomena be present, yet the instrument is a nullity in the absence of a testamentary intent. Leaving aside questions of testamentary capacity and undue influence, testamentary phenomena without testamentary intent may exist when the party executing the instrument does not know its true character, or, knowing its true character, executes it with no actual testamentary purpose. While there is a presumption that an instrument executed by a competent person was executed with knowledge of its contents, assuming him to have had opportunity to inform himself with reference thereto,⁷⁷ yet such presumption may be rebutted, and, if it be made

⁷² *Coffman v. Coffman*, 85 Va. 459, 8 S. E. 672, 2 L. R. A. 848, 17 Am. St. Rep. 69.

⁷³ *Williams v. Noland*, 10 Tex. Civ. App. 629, 32 S. W. 328.

⁷⁴ *In re Meade's Estate*, 118 Cal. 428, 50 Pac. 541, 62 Am. St. Rep. 244.

⁷⁵ *Ferguson-Davie v. Ferguson-Davie*, L. R. 15 P. D. 109.

The fact that a writing was merely the beginning of a draft of a will, if adopted as the final expression of testator's testamentary purpose, is not sufficient to require its rejection. *In re Plate's Estate*, 9 Pa. Co. Ct. R. 644.

⁷⁶ *Trustees of Western Maryland College v. McKinstry*, 75 Md. 188, 23 Atl. 471; *In re Barber's Will*, 92 Hun, 489, 37 N. Y. Supp. 235.

Failure to fill in blanks left for the names of the residuary legatees will not invalidate will, where otherwise it is complete and properly executed *animo testandi*. *Kultz v. Jaeger*, 29 App. D. C. 300.

⁷⁷ *Fawcett v. Jones*, 3 Phil. 476; *Wheeler v. Alderson*, 3 Hagg. 587; *Browning v. Budd*, 6 Moore, P. C. 435; *Smith v. Dalby*, 4 Harr. 350; *Beall v. Mann*, 5 Ga. 456; *Welgel v. Welgel*, 5 Watts (Pa.) 486; *Hoshauer v. Hoshauer*, 26

to appear that he who was apparently a testator was not in reality such because unaware of the character of the instrument, there is then no will.⁷⁸ Where the alleged testator was illiterate, it must be shown that the contents of the will were communicated to him,⁷⁹ and the same rule applies where the testator is blind⁸⁰ or incapable for any physical reason of reading the will,⁸¹ or where the will is in a language not understood by the testator.⁸²

Will Made in Jest

While the evidence for this purpose must be clear and convincing yet, with this requirement met, it may be shown that an instrument purporting to be a will was executed in jest or by way of effecting a nontestamentary purpose, in which case it is inoperative. Thus, in *Lister v. Smith*,⁸³ the question involved was whether a certain codicil, executed in due form, was entitled to probate. It being established that the testator wished one of his family to give up a house which she then occupied, and that, for the purpose of compelling her to do so, he made a pretense of revoking by the codicil in question a bequest which he had made in a will in favor of this woman's daughter, and that this was the sole purpose of executing the codicil, the codicil was denied probate. There was here no intention that the codicil should operate to revoke anything in the

Pa. 404; *Worthington v. Klemm*, 144 Mass. 167, 10 N. E. 522; *Brick v. Brick*, 44 N. J. Eq. 282, 18 Atl. 58; *Pettes v. Bingham*, 10 N. H. 514; *In re Crumb*, 6 Dem. Sur. (N. Y.) 478, 2 N. Y. Supp. 744; *Cox v. Cox*, 4 Sneed (Tenn.) 87; *Bartee v. Thompson*, 8 Baxt. (Tenn.) 513; *Maxwell v. Hill*, 89 Tenn. 584, 15 S. W. 253.

⁷⁸ *Moyer v. Swygart*, 125 Ill. 262, 17 N. E. 450; *Jenness v. Hazelton*, 58 N. H. 423; *Hildreth v. Marshall*, 51 N. J. Eq. 241, 27 Atl. 465; *Baker v. Baker*, 102 Wis. 226, 78 N. W. 453; *Goods of Hunt*, L. R. 3 P. & D. 250.

⁷⁹ *Day v. Day*, 3 N. J. Eq. 549; *Lyons v. Van Riper*, 26 N. J. Eq. 337; *Rollwagen v. Rollwagen*, 63 N. Y. 504; *Patton v. Allison*, 7 Humph. (Tenn.) 332; *Rutland v. Gleaves*, 1 Swan (Tenn.) 200; *Key v. Holloway*, 7 Baxt. (Tenn.) 575; *Watterson v. Watterson*, 1 Head (Tenn.) 2; *Maxwell v. Hill*, 89 Tenn. 584, 15 S. W. 253. See, however, *Patton v. Hope*, 37 N. J. Eq. 522.

⁸⁰ *Barton v. Robins*, 3 Phil. 455, note (1); *Day v. Day*, 3 N. J. Eq. 549.

⁸¹ *Day v. Day*, 3 N. J. Eq. 549; *Harwood v. Baker*, 3 Moore, P. C. C. 228; *Croft v. Day*, 1 Curt. 784.

⁸² *Miltenberger v. Miltenberger*, 78 Mo. 27. See, however, *Dickinson v. Dickinson*, 61 Pa. 401.

It is believed that the rule followed in the case first cited is the better one. When the testator, by reason of his ignorance or physical condition, cannot apprise himself of the contents of the instrument, positive evidence should be required to show that knowledge of its actual contents was brought home to him. For testamentary intent must be made to appear. And the presumption which aids to effect this proof disappears when, on the facts, the testator was not, of himself, able to learn the contents of the instrument.

⁸³ 3 Sw. & Tr. 282.

will. He merely wished the mother to believe that an intent existed which did not in reality exist. So, where that which was, in form, a will was shown to have been made merely as a specimen of what might be done in the way of brevity, in case one should wish to make a very short will, the instrument was refused probate.⁸⁴

Influenced, however, by the possibility of overthrowing a genuine will by parol evidence, some American courts have treated the due execution and attestation by a competent testator of a will, with the formalities required by statute, as raising a conclusive presumption of animus testandi.⁸⁵

Testamentary Intention Incomplete

When an instrument is begun with a view to embody therein the maker's testamentary wishes, but manifestly fails to do so completely, it is not a will, because it is not a complete expression of full testamentary intent. Thus, an instrument which began as a will, and was signed, directed the sale of a house and a division of the proceeds among certain persons, some of whose names were erased, and referred to certain stocks, with a memorandum: "To be arranged later. Should anything happen to me before this will is finished, it must not go into litigation." There were also numerous blanks throughout the instrument. This was clearly not a will.⁸⁶ So where a party gave instructions for drawing his will, but became unconscious before it was completed, the draft was not his will, because with regard to it, he had no testamentary intent.⁸⁷

Tests of the Presence of Testamentary Intent

To determine whether the document itself discloses a testamentary intent, two tests are commonly resorted to, viz., whether the instrument operates to create any interest prior to the death of the maker,⁸⁸ and whether it is revocable during the life of the maker.⁸⁹ If, under the instrument, any interest vests, or if such interest fails to vest merely because of lack of delivery of the instrument, then

⁸⁴ *Nichols v. Nichols*, 2 Phil. 180. See, also, *In re Barber's Will*, 92 Hun, 489, 37 N. Y. Supp. 235.

⁸⁵ *Barnewall v. Murrell*, 108 Ala. 366, 18 South. 831; *In re Kennedy's Will*, 159 Mich. 548, 124 N. W. 516, 28 L. R. A. (N. S.) 417, 134 Am. St. Rep. 743, 18 Ann. Cas. 892, where verdict directed for proponent, although contestant introduced evidence tending to show that testator executed the alleged will solely to induce certain relatives to believe that he had made a will in their favor, and without intending that it should operate as a will.

⁸⁶ *In re Barber's Will*, 92 Hun, 489, 37 N. Y. Supp. 235.

⁸⁷ *Aurand v. Wilt*, 9 Pa. 54.

⁸⁸ *Hearn v. Purnell*, 110 Md. 458, 72 Atl. 906; *IN RE MCINTYRE'S ESTATE*, 156 Mich. 240, 120 N. W. 587, *Dunmore Cas. Wills*, 5; *Givens v. Ott*, 222 Mo. 395, 121 S. W. 23.

⁸⁹ *Williams v. Schatz*, 42 Ohio St. 47.

it is not a will. In other words, if any interest either vests or is capable of vesting prior to the death of the maker, the instrument is not a will. Revocability is of the very essence of a will, and ordinarily revocability exists because no estate or interest vests during the lifetime of the testator. In short, the two tests substantially reduce themselves to the single test, viz., whether any present interest is created or is capable of being created by the instrument. The difference between a will and a deed, executed but not delivered, is this: The will, if unrevoked, will operate upon the death of the testator. The deed will never operate unless delivered before that time; while, in event of such delivery, the interests therein created vest and cannot be revoked by the grantor.⁹⁰ The difference between a will and a deed, delivered, but reserving a power of revocation to the grantor, is this: The will is revocable by its very nature; the estates created by the deed may be revoked by virtue of the express reservation of the power. By the one, no estates or interests are created until death; by the other, estates or interests are created, immediately upon delivery, defeasible upon a condition subsequent, viz., the exercise of the power of revocation.⁹¹ Hence, revocability is merely the incident, resulting from the fact that, in the case of a will, nothing vests prior to the testator's death. In a sense, a will is revocable merely because there is nothing to revoke, or, rather, because its revocation will affect nothing except the instrument itself, i. e., its power to operate upon the testator's death. If an instrument in writing concerning real estate passes a present interest, although the right to its possession and enjoyment may not accrue until some future time, the instrument is a conveyance or a contract to convey; but if it passes an interest or right only upon the death of the maker, it is testamentary in its nature.⁹²

Illustrations

The cases abound in illustration of the application of the principles as above set forth. An instrument purporting to be a deed of

⁹⁰ A. may deliver a deed to B. to be delivered to C. only upon A.'s death. *Thurston v. Tubbs*, 257 Ill. 463, 100 N. E. 947; *Wheelwright v. Wheelwright*, 2 Mass. 447, 3 Am. Dec. 68. If A. reserves the power of recall, he is attempting to make a testamentary disposition, and his deed is inoperative. *Williams v. Schatz*, 42 Ohio St. 47; *Phillips v. Henry* (Tex. Civ. App.) 135 S. W. 382. But A. may reserve the right to make a will of the property conveyed without rendering the deed inoperative. *Ruggles v. Lawson*, 13 Johns. (N. Y.) 285, 7 Am. Dec. 375.

⁹¹ *Jordan v. Jordan's Adm'r*, 65 Ala. 301.

⁹² *Perry v. Perry*, 66 Hun, 629, 21 N. Y. Supp. 133; *Reed v. Hazleton*, 37 Kan. 321, 15 Pac. 177; *Poore v. Poore*, 55 Kan. 687, 41 Pac. 973; *Swann v. Housman*, 90 Va. 816, 20 S. E. 830; *In re Slinn's Goods*, 15 Prob. Div. 156.

One instrument may consist of several parts, some of which are to take

gift, but unsigned, was shown to have been written to take effect, not at the maker's death, but at once, provided the maker saw fit to execute and deliver it. Such a paper was obviously not a will.⁹³ But a writing providing, "This is good to Miss Rubie Ferris for \$800, as payment for care and attendance rendered by her to me in my last sickness; this \$800 is to be collected out of my estate, providing, however, I die a bachelor"—was construed to be a will, and not a mere admission of indebtedness, since it was conditional on his dying a bachelor, and was not to take effect until his death.⁹⁴ But a paper executed under seal, directing the maker's executor or administrator to pay after her death, in consideration of moneys advanced, a sum of money to the executor of C., is not testamentary.⁹⁵ A provision in a lease, however, that, in event of the lessor's death before its expiration, the rent for the unexpired term shall be paid to his wife, is an attempt to make a testamentary disposition of property, inoperative through lack of proper execution.⁹⁶

When a grantor conveyed land to his son, reserving a life estate effect at once, while others operate as a testamentary disposition. *Gomez v. Higgins*, 130 Ala. 493, 30 South. 417.

⁹³ *Johnson v. Johnson*, 103 Tenn. 32, 52 S. W. 814.

⁹⁴ *Ferris v. Neville*, 127 Mich. 444, 86 N. W. 960, 54 L. R. A. 464, 89 Am. St. Rep. 480.

But where an instrument read thus: "Due F. the sum of \$204.68, with interest; and said sum of money is not to be paid during my lifetime, but to be paid by my executor out of my estate within a year after my death, and said sum is due and owing by my son E. F. to the said F. I bind my executor to pay the same out of my estate, and then to be deducted of the distributive share coming to my said son E. F. out of my estate. Witness my hand and seal," etc.—it was held to be an acknowledgment of a present indebtedness, and a binding obligation on the maker's executor. *Feeser v. Feeser*, 93 Md. 716, 50 Atl. 406.

An instrument reading thus: "At my death, my estate or my executor pay to July Ann Cover three thousand dollars. David Engel. [Seal.]"—was delivered by the maker to Cover. She sued the executor to recover on the instrument as an obligation for the payment of money. Held, that it was testamentary in its character, and could not be made the foundation of an action. *Cover v. Stem*, 67 Md. 449, 10 Atl. 231, 1 Am. St. Rep. 406. See, also, *Pelley's Adm'r v. Earles*, 107 Ky. 640, 55 S. W. 550.

⁹⁵ *In re Holt's Estate*, 22 Pittsb. Leg. J. (N. S.) 335. Clearly, had this instrument been delivered, it might have been made the foundation of an action. It was a chose in action, title to which would have passed on delivery. At the very least, it was an evidence of indebtedness; hence not a will.

⁹⁶ *Priester v. Hohloch*, 70 App. Div. 256, 75 N. Y. Supp. 405.

An instrument whereby a married woman leases premises to her husband during his natural life, rent free, such lease to take effect from its date, cannot, on the lessor's death, be probated as a will. *In re Ogle's Estate*, 97 Wis. 56, 72 N. W. 389. Clearly, all that prevents its immediate operation is lack of delivery. See, also, *Williams v. Noland*, 10 Tex. Civ. App. 629, 32 S. W. 328.

in and power of disposition and management over it, and the proceeds of the sale of it to his own use, and upon his death, if the land remained unsold, it was to go to his children, the instrument was held to operate as a will, such being the manifest intention of the testator.⁹⁷ This instrument clearly operates both as a conveyance and as a will—as a conveyance, to transfer the legal title to the grantee; as a will, to make testamentary disposition of the beneficial interest created for the grantor.

An instrument read thus: "I this day * * * give all my property [to two beneficiaries], but I am to have the use of all so long as I live, * * * and after my death [the beneficiaries] are to have full and free use of all my property, for value received." It was executed ten years before the maker's death, and kept by her in her Bible. It was without attesting witnesses, but a few days before her death she had it read over to her, and then directed that it be put away in a safe place. The testamentary intent is apparent, and the instrument was held to be a will.⁹⁸ Without attesting witnesses, and apparently without a seal, it could have had no effect as a conveyance, if delivered during the life of the maker. It must operate as a will or not at all.

So any instrument which, upon delivery, becomes a chose in action or an evidence of indebtedness is not testamentary in character, because it operates otherwise than as a testament, as in the case of a note payable at a certain time after the death of the maker.⁹⁹

Questions involving the application of the general principle have occasionally arisen from partnership agreements. Thus, where a copartnership was formed between a father and son, under an agreement whereby the former contributed all his capital, the agreement reciting that the father conveyed his half interest to the son, and that in event of the father's death the entire business was to become the property of the son for life, and at his death the assets were to be divided in a certain manner, a testamentary disposition of the property owned by the father was held to result.¹ While this

⁹⁷ *Stroup v. Stroup*, 140 Ind. 179, 39 N. E. 864, 27 L. R. A. 523. See, also, *Ellis v. Pearson*, 104 Tenn. 591, 58 S. W. 318; *Comer v. Comer*, 120 Ill. 420, 11 N. E. 848; *Roberts v. Coleman*, 37 W. Va. 143, 16 S. E. 482; *In re Pritchett's Estate*, 9 Pa. Co. Ct. R. 600.

⁹⁸ *In re Klsecker's Estate*, 190 Pa. 476, 42 Atl. 886.

⁹⁹ *Kirkpatrick v. Pyle*, 6 Houst. (Del.) 569; *Beatty's Estate v. Western College of Toledo*, 177 Ill. 280, 52 N. E. 432, 42 L. R. A. 797, 69 Am. St. Rep. 242, affirming *Miller v. Same*, 71 Ill. App. 587; *In re Sunday's Estate*, 167 Pa. 30, 31 Atl. 353. See, also, *Krell v. Codman*, 154 Mass. 454, 28 N. E. 578, 14 L. R. A. 860, 26 Am. St. Rep. 260.

¹ *Gomez v. Higgins*, 130 Ala. 493, 30 South. 417.

But where an uncle and nephew entered into partnership for the practice of

agreement may have operated, to an extent, as a conveyance, it also clearly affected a disposal, by will, of the father's interest in the partnership business.

Deposits of money have occasionally involved the application of the same principle. Thus, where a mother deposited funds with a bank, taking a pass book reciting that the account was with the mother and a designated daughter, the bank officials being informed that she wished to retain control of the money until her death, when it was to go to the daughter, there being no intention on the part of the mother to make a present gift, it was held to be an attempted and void testamentary disposition.²

A Deed or a Will

Doubt frequently arises whether a given instrument operates as a deed or a will. But the same principle steadily controls. "The essential difference between a deed and a will is that a deed must pass a present interest in the property, although the right to possession and enjoyment may not accrue until some future time, while an instrument which passes no interest until after the maker's death is a will."³ If the instrument takes effect in *præsenti*, or is capable of then taking effect, read in the light of the maker's in-

medicine, agreeing that in event of the death of the senior member of the firm all his property, personal and otherwise, which he held in partnership at the time of his death, should go to the junior partner, it was held that this was not a testamentary disposition of the property, and hence it was capable of enforcement in equity as a contract. *McKinnon v. McKinnon*, 56 Fed. 409, 5 C. C. A. 530, reversing *Id.* (C. C.) 46 Fed. 713.

The distinction between the two cases is reasonably clear. In the latter the agreement that the junior partner should have the entire partnership effects upon the death of his senior was a part of the consideration which led him to enter into the partnership. It was a contract, supported by a sufficient consideration, and therefore capable of enforcement in equity. In the Alabama case the element of contract, so far as the disposal of the father's interest in the property was concerned, was wholly lacking.

² *Appeal of Main*, 73 Conn. 638, 48 Atl. 965. See, also, *Metropolitan Sav. Bank v. Murphy*, 82 Md. 314, 33 Atl. 640, 31 L. R. A. 454, 51 Am. St. Rep. 473; *Stevenson v. Earl*, 65 N. J. Eq. 721, 55 Atl. 1091, 103 Am. St. Rep. 790, 1 Ann. Cas. 49.

³ *Harper v. Reaves*, 132 Ala. 625, 32 South. 721; *President, etc., of Bowdoin College v. Merritt* (C. C.) 75 Fed. 480; *McINTYRE'S ESTATE*, 156 Mich. 240, 120 N. W. 587, *Dunmore Cas. Wills*, 5; *In re Lautenshlager*, 80 Mich. 285, 45 N. W. 147; *Dye v. Dye*, 108 Ga. 741, 33 S. E. 848; *Blackman v. Schlerman*, 21 Tex. Civ. App. 517, 51 S. W. 886; *Powers v. Scharling*, 64 Kan. 339, 67 Pac. 820; *Pennington v. Lawson* (Ky.) 65 S. W. 120; *Sibley v. Somers*, 62 N. J. Eq. 595, 50 Atl. 321; *Smith v. Baxter*, 62 N. J. Eq. 209, 49 Atl. 1130; *Goad v. Lawrence* (Ky.) 68 S. W. 411; *Dexter v. Witte*, 138 Wis. 74, 119 N. W. 891.

tention, it is a deed, though the enjoyment of the interests created be postponed until the grantor's death.⁴

In determining whether an instrument is capable of thus acting, regard must be had to the intention of the maker, viewed in the light of the language of the instrument and the circumstances surrounding the parties and attendant upon its execution. If these reveal an intention that the instrument shall have a post mortem operation only, it is then a will,⁵ though the instrument itself be sealed, delivered, and capable of operating as a deed, so far as its language alone is concerned.⁶ The name applied to the instrument, its language, or the belief of the maker as to its character, do not, of themselves, control, but must be weighed with all the other circumstances for the purpose of ascertaining the maker's intent.⁷ He need not call the instrument a will; indeed, save in those jurisdictions where a declaration to that effect is required by statute, he need not be aware that he has made a will; he may think that some other word may more properly describe the instrument. In a word, his conception of a will need not tally with the legal conception of a will. His own notion as to the legal status of the instrument is immaterial. The law determines that, when once its essential characteristic is ascertained.⁸

⁴ *Boling's Heirs v. Boling's Ex'r*, 22 Ala. 826; *West v. Wright*, 115 Ga. 277, 41 S. E. 602; *Owen v. Smith*, 91 Ga. 564, 18 S. E. 527; *Ackman v. Potter*, 239 Ill. 578, 88 N. E. 231; *Saunders v. Saunders*, 115 Iowa, 275, 88 N. W. 329; *Lauck v. Logan*, 45 W. Va. 251, 31 S. E. 986; *Burlington University v. Barrett*, 22 Iowa, 60, 92 Am. Dec. 376; *Craven v. Winter*, 38 Iowa, 471; *Phifer v. Mullis*, 167 N. C. 405, 83 S. E. 582, citing *Gardner on Wills*; *Knowlson v. Fleming*, 165 Pa. 10, 30 Atl. 519; *Wilson v. Anderson*, 186 Pa. 531, 40 Atl. 1096, 44 L. R. A. 542.

See, however, *Stroup v. Stroup*, 140 Ind. 179, 39 N. E. 864, 27 L. R. A. 523.

⁵ *Kelly v. Richardson*, 100 Ala. 584, 13 South. 785; *Clarke v. Ransom*, 50 Cal. 595, 600; *Goff v. Davenport*, 96 Ga. 423, 23 S. E. 395; *Comer v. Comer*, 120 Ill. 420, 11 N. E. 848; *IN RE LONGER'S ESTATE*, 108 Iowa, 34, 78 N. W. 834, 75 Am. St. Rep. 206, *Dunmore Cas. Wills*, 7; *Lacy v. Comstock*, 55 Kan. 86, 39 Pac. 1024; *Carey v. Dennis*, 13 Md. 1, 19; *Bromley v. Mitchell*, 155 Mass. 509, 30 N. E. 83; *In re Lautenshlager*, 80 Mich. 285, 45 N. W. 147; *Conrad v. Douglas*, 59 Minn. 498, 61 N. W. 673; *Robnett v. Ashlock*, 49 Mo. 171; *Gage v. Gage*, 12 N. H. 371; *Boon v. Castle*, 61 Misc. Rep. 474, 115 N. Y. Supp. 583; *Patterson v. English*, 71 Pa. 458; *Carpenter v. Hannig* (Tex. Civ. App.) 34 S. W. 774; *Lauck v. Logan*, 45 W. Va. 251, 31 S. E. 986; *In re Slinn's Goods*, 15 P. R. 156.

⁶ *Moody v. Macomber*, 159 Mich. 657, 124 N. W. 549, 134 Am. St. Rep. 755; *Crocker v. Smith*, 94 Ala. 295, 10 South. 258, 16 L. R. A. 576; *Townsend v. Rackham*, 143 N. Y. 516, 38 N. E. 731; *Hannig v. Hannig* (Tex. Civ. App.) 24 S. W. 695.

⁷ *Lauck v. Logan*, 45 W. Va. 251, 31 S. E. 986.

⁸ *Nichols v. Emery*, 109 Cal. 323, 41 Pac. 1089, 50 Am. St. Rep. 43; *In re*

Parol Evidence to Remove Doubt

Where there is nothing upon the face of the instrument to raise doubt as to its character, and it is executed with the formalities required in the case of wills, no parol evidence can be received to control the plain scope and character of the instrument.⁹ Where, however, the instrument itself suggests uncertainty as to its character, parol evidence may be received of all facts and circumstances which are calculated to shed light upon the incentive by which the maker was actuated, and which he intended to express, in making the instrument in question.¹⁰ These include the family relations of the decedent, the extent, character, and situation of his property, his age and mental condition at the time of executing the writing in question,¹¹ instructions given to the draughtsman as to the nature of the paper he was to prepare,¹² conversations of the deceased at the time of executing the instrument, and failure to dispose of all his property.¹³

Stumpenhousen's Estate, 108 Iowa, 555, 79 N. W. 376; *Smith v. Holden*, 58 Kan. 535, 50 Pac. 447; *Wall v. Wall*, 30 Miss. 91, 64 Am. Dec. 147; *In re Cawley's Estate*, 136 Pa. 628, 20 Atl. 567, 10 L. R. A. 93; *Lauck v. Logan*, 45 W. Va. 251, 31 S. E. 986.

"Whether the maker would have called this a deed or a will is one question; whether it shall operate as a deed or will is a distinct question, that is to be governed by the provisions of the instrument." *Buller, J., in Habergam v. Vincent*, 2 Ves., Jr., 231.

⁹ *Whyte v. Pollok*, 7 App. Cas. 400; *Brown v. Avery*, 63 Fla. 355, 376, 58 South. 34, Ann. Cas. 1914A, 90; *Noble v. Fickes*, 230 Ill. 594, 82 N. E. 950, 13 L. R. A. (N. S.) 1203, 12 Ann. Cas. 282; *Sewell v. Slingluff*, 57 Md. 537; *Elliott v. Cheney*, 183 Mich. 561, 150 N. W. 163; *Clay v. Layton*, 134 Mich. 317, 96 N. W. 458; *Schoul. Wills*, § 277. The English courts, even where the words are unequivocally those of a deed, have admitted parol evidence to prove an *animus testandi*. *Goods of Slinn*, L. R. 15, P. D. 156.

¹⁰ *Lee v. Shivers*, 70 Ala. 288; *Rice's Adm'r v. Rice*, 68 Ala. 216; *Jordan v. Jordan's Adm'r*, 65 Ala. 301; *Campbell v. Gilbert*, 57 Ala. 569; *Daniel v. Hill*, 52 Ala. 430; *Gillham v. Mustin*, 42 Ala. 365; *Sharp v. Hall*, 86 Ala. 110, 5 South. 497, 11 Am. St. Rep. 28; *Mealing v. Pace*, 14 Ga. 596, 630; *Symmes v. Arnold*, 10 Ga. 506; *Tuttle v. Raish*, 116 Iowa, 331, 90 N. W. 66; *Jackson v. Jackson's Adm'r*, 6 Dana (Ky.) 257; *Succession of Morvant*, 45 La. Ann. 207, 12 South. 349; *Gage v. Gage*, 12 N. H. 371; *Chichester v. Quatrefagas*, Prob. 186, 11 Reports, 605; 1 *Jarm. Wills* (Big. Ed.) 25.

¹¹ *Clarke v. Ransom*, 50 Cal. 595; *Ehrenberg's Succession*, 21 La. Ann. 280, 99 Am. Dec. 729; *Barker v. Comins*, 110 Mass. 477; *Osborn v. Cook*, 11 Cush. (Mass.) 532, 59 Am. Dec. 155; *In re English*, 3 Sw. & Tr. 586; *In re Cawley's Estate*, 136 Pa. 628, 20 Atl. 567, 10 L. R. A. 93.

¹² *Sharp v. Hall*, 86 Ala. 110, 5 South. 497, 11 Am. St. Rep. 28; *Green v. Proude*, 1 Mod. 117.

¹³ *Sharp v. Hall*, 86 Ala. 110, 5 South. 497, 11 Am. St. Rep. 28; *Wareham v. Sellers*, 9 Gill & J. (Md.) 98; *Witherspoon's Heirs v. Witherspoon's Ex'rs*, 2 McCord (S. C.) 520; *Smith v. Smith*, 112 Va. 205, 70 S. E. 491, 33 L. R. A. (N. S.) 1018.

Instruments Held to be Deeds

As a result of the application of the principles just discussed, the following instruments have been held to be deeds:

An instrument reciting in the habendum clause that the maker relinquishes all right, title, and interest in certain land to a person named, his heirs and assigns, to have and to hold in fee simple, and this although the granting clause used the words, "have given and bequeathed."¹⁴

An instrument in form a warranty deed, but containing these words: "Conditions of this deed are such * * * that this land shall not be incumbered in any way or this deed shall be void. The party of the first part is to hold said property in his lifetime."¹⁵

An instrument purporting to be a deed, acknowledged as such, and delivered to the grantee, reciting a nominal consideration, and continuing, "It is hereby distinctly understood and stipulated that this deed shall take and be in full force and effect immediately after the said [grantor] shall depart this life, and not sooner."¹⁶

An instrument executed and acknowledged as a deed by a husband and wife, conveying certain property to their son, reserving a homestead in themselves during their lives and the life of the survivor, and providing that it shall not take effect until the death of the grantors.¹⁷

An instrument purporting to be a deed of certain land, and reciting that the grantor and his wife were to keep possession during their lives, and at their death the absolute title and possession were to be vested in the grantees, and if the grantor should sell the land the grantees were to have the proceeds in the same manner that they were to have the lands; that is, after the death of the gran-

¹⁴ *Parker v. Stephens* (Tex. Civ. App.) 39 S. W. 164.

¹⁵ *Bevins v. Phillips*, 6 Kan. App. 324, 51 Pac. 59.

An instrument purporting to convey to the grantee certain lands, and reserving to the grantor the use of the premises during his life, is a deed, passing to the grantee the legal title in præsentî, with the right of possession postponed to the death of the grantor. *Guthrie v. Guthrie*, 105 Ga. 86, 31 S. E. 40; *Latimer v. Latimer*, 174 Ill. 418, 51 N. E. 548. See, also, *Bowler v. Bowler*, 176 Ill. 541, 52 N. E. 437.

¹⁶ *Lauck v. Logan*, 45 W. Va. 251, 31 S. E. 986; *Love v. Blauw*, 61 Kan. 496, 59 Pac. 1059, 48 L. R. A. 257, 78 Am. St. Rep. 334; *Wynn v. Wynn*, 112 Ga. 214, 37 S. E. 378.

¹⁷ *Martin v. Faries*, 22 Tex. Civ. App. 539, 55 S. W. 601. See *Barnes v. Stephens*, 107 Ga. 436, 33 S. E. 399; *Blackman v. Schierman*, 21 Tex. Civ. App. 517, 51 S. W. 886; *Guthrie v. Guthrie*, 105 Ga. 86, 31 S. E. 40; *Lauck v. Logan*, 45 W. Va. 251, 31 S. E. 986; *Robinson v. Ingram*, 126 N. C. 327, 35 S. E. 612 (a conveyance from father to children, the latter to support their parents and divide the property upon their death, the conveyance to be void should they violate any of the trusts embraced in the deed).

tor and his wife.¹⁸ An instrument, in form a deed, reserving a life estate and delivered to a depositary with directions to hold it until the grantor's death and then deliver to the grantee, is not testamentary in character.¹⁹

Instruments Held to be Wills

The application of the same principles has led to the conclusion that wills existed in the following instances: Testatrix, after making her will, wrote on a sheet of note paper: "I give to my daughter W. my residence on Broadway and all pertaining thereto, to have and hold forever in her own right." She signed, and afterwards acknowledged, this before a notary, as she would a deed, and it was attested by two witnesses. The document was found among her valuable papers after her death, in an envelope, upon which were indorsed, in her own handwriting, the words: "For W., at or after my death." The instrument was held to be a codicil, and not a deed of gift, since the disposition of the property referred to was to take effect after the death of the testatrix.²⁰

An instrument, although in form a deed, which, by its terms, was to operate only after the death of the maker, was held to be testamentary in its character.²¹ So where in pursuance to a statement by a husband that he wished to will his land to his wife, so that she might have it after he was dead, if she was a good wife, but that, if she was not, he did not want her to have it, an attorney drew up a deed to the land, reciting therein that it was not to take effect until after the grantor's death, the deed was regarded as a will, and revocable at the pleasure of the grantor.²²

A deed of conveyance, in ordinary form, containing a clause that "the intention of this instrument is that the grantor relinquishes her right at her death, then this deed is to come immediately into effect, but not till then," is testamentary in its character, and in-

¹⁸ *Horn v. Broyles* (Tenn. Ch. App.) 62 S. W. 297. For further illustrations, see *Ward v. Ward*, 104 Ky. 857, 48 S. W. 411; *In re Young's Estate*, 123 Cal. 337, 55 Pac. 1011; *Watson v. Watson*, 24 S. C. 228, 58 Am. Rep. 247; *President, etc., of Bowdoin College v. Merritt* (C. C.) 75 Fed. 480; *Rawlings v. McRoberts*, 95 Ky. 346, 25 S. W. 601; *Worley v. Daniel*, 90 Ga. 650, 16 S. E. 938; *Beebe v. McKenzie*, 19 Or. 296, 24 Pac. 236; *McOnie v. Whyte*, L. R. 15 App. Cas. 156; *Majoribanks v. Hovenden*, 1 Den. 11; *Hall v. Hall*, 109 Va. 117, 63 S. E. 420, 21 L. R. A. (N. S.) 533.

¹⁹ *Dickson v. Miller*, 124 Minn. 346, 145 N. W. 112.

²⁰ *Grigsby's Legatees v. Willis' Estate*, 25 Tex. Civ. App. 1, 59 S. W. 574. See, also, *In re Skerrett's Estate*, 67 Cal. 585, 8 Pac. 181; *Fosselman v. Elder*, 98 Pa. 159; *Chrisman v. Wyatt*, 7 Tex. Civ. App. 40, 26 S. W. 759.

²¹ *Pinkham v. Pinkham*, 55 Neb. 729, 76 N. W. 411.

²² *De Bajligethy v. Johnson*, 23 Tex. Civ. App. 272, 56 S. W. 95.

operative as a deed.²³ So an apparent conveyance in trust to support grantor, and pay the residue of the fund to the grantor's children one year after his death, has been held to be a will,²⁴ as was also a trust deed to grantor's use for life, reserving a power of revocation and sale to the grantor.²⁵

Deeds by husband and wife, conveying the lands of each to the other, delivered in escrow, the deed of the one first dying then to be recorded, have been held to be testamentary instruments and revocable.²⁶

²³ *Murphy v. Gabbert*, 166 Mo. 596, 66 S. W. 536, 89 Am. St. Rep. 733. For further illustrations, see *Barnes v. Stephens*, 107 Ga. 436, 33 S. E. 399; *Jennings v. Neville*, 180 Ill. 270, 54 N. E. 202; *Crocker v. Smith*, 94 Ala. 295, 10 South. 258, 16 L. R. A. 576; *Williams v. Tolbert*, 66 Ga. 127; *Dye v. Dye*, 108 Ga. 741, 33 S. E. 848; *Donald v. Nesbit*, 89 Ga. 290, 15 S. E. 367; *Kelly v. Richardson*, 100 Ala. 584, 13 South. 785; *Poore v. Poore*, 55 Kan. 687, 41 Pac. 973; *Atty. Gen. v. Jones*, 3 Price, 368.

²⁴ *Frederick's Appeal*, 52 Pa. 338, 91 Am. Dec. 159.

²⁵ *Stroup v. Stroup*, 140 Ind. 179, 39 N. E. 864, 27 L. R. A. 523. This decision is, however, opposed to the weight of authority. See ante, p. 17.

²⁶ *In re Edwall's Estate* (1913) 75 Wash. 391, 134 P. 1041. See, however, *Kenney v. Parks* (Cal.) 54 Pac. 251.

CHAPTER II

FORM OF WILLS

- 6-7. No Particular Form Required.
- 8-9. Duplicate and Partial Wills.
- 10-11. Incorporation by Reference.

NO PARTICULAR FORM REQUIRED

- 6. No formality is required in the preparation of a will up to the point of execution. Any writing materials capable of giving and receiving reasonably permanent impressions may be used for this purpose. The will may be written or printed in any language, understood by or translated to the testator, and the expressions may be wholly informal, provided that they clearly indicate a testamentary intent.
- 7. Under modern statutes, all wills, save nuncupative wills, must be in writing, but the writing may take any form.

The law has not made it necessary to the validity of a will that it should assume any particular form, or be couched in language technically appropriate to its testamentary character.¹ It is sufficient that the instrument, however irregular in form or inartificial in its expression, discloses the intention of the maker respecting the posthumous destination of his property; and, if this appear to be the nature of its contents, any contrary title or designation which he may have given it will be disregarded.² But this testamentary

¹ 1 Jar. Wills (Big. Ed.) 21; Loring v. Sumner, 23 Pic. (Mass.) 98, 101; Keith v. Scales, 124 N. C. 497, 32 S. E. 809; In re Stumpenhousen's Estate, 108 Iowa, 555, 79 N. W. 376; In re Noyes' Estate, 40 Mont. 231, 106 Pac. 355.

² 1 Jar. Wills (Big. Ed.) 21; Whyte v. Pollok, 7 App. Cas. 409.

Thus an instrument reading, "I have given six hundred dollars or more, if necessary, to put a good iron fence around the graveyard near the Lutheran Church in this place," etc., signed by decedent and witnessed, may be probated as a will. In re Diehl's Estate, 11 Pa. Super. Ct. 293. See, also, Goods of Coles, L. R. 2 P. & D. 362, and IN RE LONGER'S ESTATE, 108 Iowa, 34, 78 N. W. 834, 75 Am. St. Rep. 206, Dunmore Cas. Wills, 7.

An instrument read thus: "This is to serefey that le levet to mey wife Real and personal and she to dispose for them as she wis." Being dated and signed, it was held to be neither vague nor uncertain, and that it devised to the wife all the real and personal property of the husband. Mitchell v. Donohue, 100 Cal. 202, 34 Pac. 614, 38 Am. St. Rep. 279.

The following instrument was held to have a similar effect: "New Orleans, June 29, 1896. I want my nese Jenny Donan to have muy portby and perionn when I die. I point sole execytrix of muy estate Rebecca Arbuckle." Succession of Stewart, 51 La. Ann. 1553, 26 South. 460. See, also, Sullivan's Es-

intention must clearly appear; otherwise the instrument cannot operate as a will.³

The testator may put the will in any language which he chooses, even though it be a language with which he is not acquainted.⁴ Thus a will written in English, at the request of the maker, who was a German, and did not understand English, and which was interpreted to her, was admitted to probate,⁵ the court declining to follow the suggestion of Judge Redfield to the contrary in this connection.⁶

But the fact that the will was in a language unknown to the testator would doubtless require accounting for and would bear on the question of testamentary intent.⁷ It would perhaps be necessary also to show that the contents of the will were communicated to the testator,⁸ though it would seem that proof that the instructions given in the testator's native tongue were correctly rendered into the language in which the will was written ought to be sufficient. Such proof would undoubtedly need to be established by clear and convincing evidence.

Precatory Words

The testator may use such language as he chooses to express his testamentary intentions, provided his choice results in the use of language sufficient for that purpose, viewed from the standpoint of the court. If the wish, desire, or recommendation contained in the precatory language is meant to govern the conduct of the party to whom it is addressed or to determine the disposition of property, it is then an expression of testamentary determination, i. e., a will, and will be given effect, if properly executed. But if the wish, de-

tate, 130 Pa. 342, 18 Atl. 1120; Byers v. Hoppe, 61 Md. 206, 48 Am. Rep. 89; Cover v. Stem, 67 Md. 449, 10 Atl. 231, 1 Am. St. Rep. 406.

The addition of a seal to an instrument intended for a will does not make it a deed. Wuesthoff v. Insurance Co., 107 N. Y. 580, 14 N. E. 811.

³ In re Scott's Estate, 128 Cal. 57, 60 Pac. 527; In re Jacoby's Estate, 190 Pa. 382, 42 Atl. 1026 (where, on a box containing most of the decedent's property there was the direction, "In case of my death, I want this box to go to my attorney," the decedent having also left a formally prepared will); Young v. Wark, 76 Miss. 829, 25 South. 660; Hinkle v. Landis, 131 Pa. 573, 18 Atl. 941. See, also, White v. Crossman (N. J. Ch.) 64 Atl. 168.

⁴ Dickinson v. Dickinson, 61 Pa. 401; Hoshauer v. Hoshauer, 26 Pa. 404; In re Cliff's Trusts, 2 Ch. Div. (1892) 229; Green v. Skipworth, 1 Phil. 58.

If the writing is blind or obscure, the court may send it to a master to have it deciphered. Masters v. Masters, 1 P. Wms. 421.

⁵ In re Walter's Will, 64 Wis. 487, 25 N. W. 538, 54 Am. Rep. 640.

⁶ 1 Redf. Wills, *166, note.

⁷ Miltenberger v. Miltenberger, 78 Mo. 28.

⁸ In re Walter's Will, 64 Wis. 487, 25 N. W. 538, 54 Am. Rep. 640; Goerke v. Goerke, 80 Wis. 516, 50 N. W. 345.

sire, or recommendation is to be interpreted as a mere expression of opinion or the offering of advice, which the person taking the legal title to the property is at liberty to disregard if he so pleases, it can have only the effect that it was meant to have, and nothing more.⁹ Thus, an instrument reading, "I wish Mym Sister, Louisa Cock, to have my Charing Cross bankbook, for her own use," and signed, was held to be a will,¹⁰ while a document headed, "This is not meant as a legal will, but as a guide," was refused probate.¹¹ This topic will be discussed more at length in connection with trusts.¹²

Materials Used

A will may be written upon any material capable of receiving and retaining a legible and reasonably permanent impression. While, of course, paper is the usual material used, it is believed that any material which will meet the test above stated may be employed.¹³ Although it has been held that a will written on a slate cannot be probated because of its susceptibility to erasures and substitutions,¹⁴ it may be seriously doubted if this holding is correct. Undoubtedly the use of such a medium should be viewed with great suspicion, and proof accounting for its use and establishing its genuineness should be required; but these requirements once met, there seems to be no valid legal reason for refusing probate to such an instrument. A will is "in writing" when letters or characters are used upon substances calculated to retain them for the purpose of expressing a testamentary intent. Hence, though pen and ink are commonly employed, a form either wholly or partially printed or engraved is sufficient,¹⁵ and a will may be written and signed

⁹ *Williams v. Williams*, 1 Sim. (N. S.) 58; *Bernard v. Minshull*, Johnson, 276; *Bouser v. Kinnear*, 6 Jur. (N. S.) 882; *Howarth v. Dewell*, 6 Jur. (N. S.) 1360; *In re Williams* (1897) 2 Ch. Div. 12; *Coulson v. Alpaugh*, 163 Ill. 298, 45 N. E. 216; *Mitchell v. Mitchell*, 143 Ind. 113, 42 N. E. 465; *Halsey v. Church*, 75 Md. 275, 23 Atl. 781; *Aldrich v. Aldrich*, 172 Mass. 101, 51 N. E. 449; *Fairchild v. Edson*, 154 N. Y. 199, 48 N. E. 541, 61 Am. St. Rep. 609; *Whelen's Estate*, 175 Pa. 23, 34 Atl. 329.

¹⁰ *Cock v. Cooke*, L. R. 1 P. & D. 241.

¹¹ *Ferguson-Davie v. Ferguson-Davie*, 15 P. D. 109.

¹² See post, p. 477.

¹³ See 1 Wms. Executors, 146; 1 Redf. Wills, 166.

¹⁴ *Reed v. Woodward*, 11 Phil. 541.

¹⁵ *Goods of Adams*, L. R. 2 P. & D. 367; *In re Murphy's Will*, 48 App. Div. 211, 62 N. Y. Supp. 785 (holding that a will on a printed form is valid, although a large blank space is left in the middle without being ruled off); *Roush v. Wensel*, 15 Ohio Cir. Ct. R. 133.

See, also, *In re Andrews' Will*, 162 N. Y. 1, 56 N. E. 529, 48 L. R. A. 662, 76 Am. St. Rep. 294, 30 Civ. Proc. R. 377; *Sears v. Sears*, 77 Ohio St. 104, 82 N. E. 1067, 17 L. R. A. (N. S.) 353, 11 Ann. Cas. 1008.

with lead pencil as well as with a pen.¹⁶ But, as bearing on the fundamental question whether the instrument was executed with final testamentary intent, the materials used in its preparation are significant.¹⁷ And it has been held that the general presumption and probability are that, where alterations only in pencil are made, they are deliberative; when in ink, they are final and absolute.¹⁸ It seems, however, that no true presumption is here involved.

Separate Sheets

A will may be written on separate sheets of paper,¹⁹ which need not be attached physically, if the real connection is established by the sense of the language employed.²⁰ The fact that a will is written on several separate sheets of paper, or that there are blank spaces left between the paragraphs, will not invalidate it.²¹ Definiteness of language and a clear internal connection of the various parts of the will, making up a coherent and intelligible whole, are more significant than physical attachment. Thus, where one side of a broken envelope contained a list of notes belonging to the writer, and the other side a memorandum stating that, in case of his death, "these notes" should go to his wife, the memorandum being dated and signed, the writings were regarded as too indefinite and disconnected to constitute a will.²² When a will is written upon different sheets, a signature and attestation upon the last sheet are

¹⁶ *Myers v. Vanderbilt*, 84 Pa. 510, 24 Am. Rep. 227; *Goods of Dyer*, 1 Hagg. 219.

¹⁷ *Parkin v. Bainbridge*, 3 Phil. 321; *Lavender v. Adams*, 1 Add. 406. See, also, *Patterson v. English*, 71 Pa. 454.

¹⁸ 1 Wms. Executors, 111, citing *Hawkes v. Hawkes*, 1 Hagg. 322; *Edward v. Astley*, 1 Hagg. 490; *Ravenscroft v. Hunter*, 2 Hagg. 68; *Bateman v. Pennington*, 3 Moore, P. C. C. 223; *Francis v. Grover*, 5 Hare, 39; *Goods of Hall*, L. R. 2 P. & D. 256; *Goods of Adams*, L. R. 2 P. & D. 367.

¹⁹ *Barnewall v. Murrell*, 108 Ala. 366, 18 South. 831; *Whitney v. Hanington*, 36 Colo. 407, 85 Pac. 84; *Jones v. Habersham*, 63 Ga. 146; *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113; *Palmer v. Owen*, 229 Ill. 115, 82 N. E. 275; *Ela v. Edwards*, 16 Gray (Mass.) 91; *Burnham v. Porter*, 24 N. H. 570; *Grubb's Estate*, 174 Pa. 187, 34 Atl. 573; *Gass' Heirs v. Gass' Ex'rs*, 3 Humph. (Tenn.) 278; *Bond v. Seawell*, 3 Burr. 1773.

²⁰ *MERRYFIELD'S ESTATE*, 167 Cal. 729, 141 Pac. 259, *Dunmore Cas. Wills*, 9; *Swaim's Will*, 162 N. C. 213, 78 S. E. 72, *Ann. Cas.* 1915A, 1207; *Wikoff's Appeal*, 15 Pa. 281, 53 Am. Dec. 597; *Martin v. Hamlin's Ex'rs*, 4 Strob. (S. C.) 188, 53 Am. Dec. 673.

Where a letter executed as a will provided for the cancellation of the writer's former will and that her property should go in the same way as a certain other person had arranged for hers to go, the letter and the other person's will constituted the will of the writer. *Nightingale v. Phillips*, 29 R. I. 175, 72 Atl. 220.

²¹ *Barnewall v. Murrell*, 108 Ala. 366, 18 South. 831.

²² *Succession of Shaffer*, 50 La. Ann. 601, 23 South. 739.

sufficient to cover the whole, provided that they were made for that purpose.²³

When papers are found fastened together after the death of the testator, coherent and in the natural order, and containing a will, there is a presumption that they were in this condition when the will was executed.²⁴ Such presumption may be rebutted, and the transposition, destruction, or substitution of sheets shown.²⁵

Where a will and various codicils are executed at different times, each relating to separate matters and containing no clause of revocation, all are taken together as constituting the will of the decedent.²⁶

Two or more wills may be taken together as constituting the last will of a decedent, where each instrument may be given some effect without denying effect to all of the provisions of the others.²⁷

Writing Necessary

The history of the law of wills with reference to land during the Anglo-Saxon period is so obscure that it is hardly possible to speak with certainty as to whether a writing was requisite for that purpose. Such a requirement, in view of the primitive character of the epoch, is very unlikely. As has been seen, the power of disposing of the legal title to lands disappeared with the establishment of the feudal tenures in England. Lands were, however, substantially disposed of by will by a resort to uses, and as no prescribed form for raising or declaring a use was required, an oral declaration being sufficient for this purpose,²⁸ it is likely that an oral declaration by the cestui que use as to the uses to which the feoffee to uses should hold the land upon the death of the formér would be sufficient to establish a use in favor of the beneficiary, if satisfactorily proved. A written declaration would, however, ordinarily be used.

The temporary destruction of uses by the statute of uses.²⁹ re-

²³ Jones v. Habersham, 63 Ga. 146; Marsh v. Marsh, 1 Sw. & Tr. 528.

It is always the part of prudence, however, to have the testator sign each sheet of the will, and to have the fact set forth in the attestation clause.

²⁴ Barnewall v. Murrell, 108 Ala. 366, 18 South. 831; Rees v. Rees, L. R. 3 P. & D. 84; Marsh v. Marsh, 1 S. & T. 528.

²⁵ Varnon v. Varnon, 67 Mo. App. 534.

²⁶ Stewart v. Stewart, 177 Mass. 493, 59 N. E. 116; Vestry of St. John's Parish v. Bostwick, 8 App. D. C. 452; Gordon v. Whitlock, 92 Va. 723, 24 S. E. 342; Fletcher v. Gates (Tex. Civ. App.) 63 S. W. 937.

²⁷ Whitney v. Hanington, 36 Colo. 407, 85 Pac. 84; Smith v. Gorham, 152 Ill. App. 125. Both of two distinct wills relating to property in different jurisdictions are valid. Parnell v. Thompson, 81 Kan. 119, 105 Pac. 502, 33 L. R. A. (N. S.) 658.

²⁸ 2 Wash. Real Prop. 362.

²⁹ See ante, p. 8.

sulted in the statute of wills ⁸⁰ which made possible the disposition of lands by a will, in writing, but neither attesting witnesses nor signature were necessary. Important alterations were made by the statute of frauds,⁸¹ which provided that wills of real property should be utterly void and of no effect unless they were in writing, signed by the testator or by some other person in his presence and by his express direction, and attested and subscribed in the presence of the testator by three or four credible witnesses. This statute has formed the basis of similar legislation throughout the United States.

With regard to testaments of personal property, the common law never seems to have required that wills should be made in any particular form. If by word of mouth, i. e., nuncupative testaments, they must necessarily be made in the presence of witnesses; otherwise there would be no evidence of the fact that a will had been made. If made in writing, no witnesses were necessary, nor need the testator sign the writing, provided it could be shown that he intended it to take effect as his will.⁸² The statute of frauds, however, required all wills to be in writing, except nuncupative wills under certain circumstances, to be considered hereafter.⁸³ Similar legislation has been enacted in the United States, so that, with the exception of nuncupative wills, it may be said that no will of either real or personal property is valid unless contained in a writing either wholly written by the testator himself, or signed by him or by some person in his presence and at his request, and properly attested.

Form of Writing

But while a will must be contained in a writing, no formal testamentary instrument is required. If it adequately sets forth a testamentary intent it is enough. In many instances wills have taken the form of other instruments, while in others they have been wholly informal.

Form of Assignment

A will may take the form of an assignment, as where the testator, in the presence of two attesting witnesses, signed the following instrument:

"Know all men by these presents, that I, Joseph Robinson, for the consideration of one dollar to me in hand paid, as well as my affection, do hereby assign and set over to my daughter, Eliza Jane

⁸⁰ 32 Hen. VIII, c. 1.

⁸¹ 29 Car. II, c. 3, which came into force on June 20, 1677.

⁸² Potts, *Law of Succession*, 158.

⁸³ See post, p. 44.

Brewster, all of my property, both real and personal, to have the same after my death. Witness my hand and seal this 7th day of May, 1877.

his
"Joseph X Robinson. [Seal.]
mark

"Attest: J. S. Post,
"E. McClellan."

This document was admitted to probate, its testamentary character being obvious.³⁴

Form of Deed

A will may take the form of a deed.³⁵ Thus an instrument in the form of a warranty deed, providing that upon the death of the maker "this conveyance to be delivered to said Elizabeth Kelley," and retained by the maker until his death, was held to be a will.³⁶

Form of Power of Attorney or Contract

A will may be contained in the same instrument with a power of attorney,³⁷ or may constitute one portion of a contract.³⁸ Thus an instrument appointed the maker's mother, Elizabeth Cross, attorney to take and receive certain rents, and then continued: "Or, in event of my death, I do hereby, in my name, assign and deliver to the said E. C. the sole claim to the aforementioned property, to be held by her during her life, and disposed of by her as she shall deem proper at the time of her death. At the same time I wish it to be understood that I claim all right and title to said property on my arrival in Great Britain, when the term of said E. C.'s occupancy shall be considered as at an end." The instrument, being executed

³⁴ Robinson v. Brewster, 140 Ill. 649, 30 N. E. 683, 33 Am. St. Rep. 265; Smith v. Smith, 54 N. J. Eq. 1, 32 Atl. 1069. Here testator devised property to trustees to "establish a school for apprentices and young mechanics, on plans to be hereafter described by me, or, in case of my death before perfecting said plans, the school above named is to be conducted on plans which I have from time to time described to most of the board of trustees herein named, and who shall approve of final practical plans in keeping therewith." Testator never perfected any plans, but prior to his death communicated to the trustees, at various times, in conversation, crude and general ideas with reference to the school. The trust was held invalid under a statute requiring wills to be signed and attested.

³⁵ Ante, p. 21.

³⁶ Kelly v. Richardson, 100 Ala. 584, 13 South. 785.

Accord: In re Lautenshlager, 80 Mich. 285, 45 N. W. 147; Smith v. Holden, 58 Kan. 535, 50 Pac. 447.

See, also, Frederick's Appeal, 52 Pa. 338, 91 Am. Dec. 159; Milnes v. Foden, L. R. 15 P. D. 156.

³⁷ Doe dem. Cross v. Cross, 8 Q. B. 714; Rose v. Quick, 30 Pa. 225; Stewart v. Stewart, 177 Mass. 493, 59 N. E. 116.

³⁸ Reed v. Hazleton, 37 Kan. 321, 15 Pac. 177.

in compliance with the statute of wills, was admitted to probate as such.³⁹

Form of a Letter

A will may take the form of a letter,⁴⁰ as where a testator, when about to make a sea voyage, wrote to a friend thus: "A thousand accidents may occur to me which might deprive my sisters of that protection which it would be my study to afford; and in that event I must beg that you will attend to putting them in possession of two-thirds of what I may be worth, appropriating one-third to Miss C. and her child, in any manner that may appear most proper."⁴¹ So a letter written by a testator to a friend, authorizing him to take charge and dispose of the testator's property, and to sell and convey the same as his executor, properly attested, sufficiently evidences the testator's intention to dispose of his property, and may be probated as a will.⁴² But a letter, like any other instrument, to take effect as a will, must be executed in compliance with the requirements of the statute, and must express a genuine present and not merely an anticipated testamentary intent. Where deceased wrote as follows: "Nina: I wrote you yesterday hastily. Answer my letter at once. I want to know everything about mother and all about you,—your children. I have reached the point of perfect independence, pecuniarily. My health is probably ruined, and I want to anticipate possibilities. You and your children get everything. Your boy I want given the best of educations. I would like him to go to Harvard. * * * Write me. As soon as I possibly can, I will be in Savannah"—the letter was held not to be testamentary in its character.⁴³

Form of Promissory Notes

Instruments are occasionally executed in the form of promissory notes with the intention that they shall operate as wills, and, if

³⁹ Doe dem. Cross v. Cross, 8 Q. B. 714.

⁴⁰ Barney v. Hayes, 11 Mont. 571, 29 Pac. 282, 28 Am. St. Rep. 495; Orth v. Orth, 145 Ind. 184, 42 N. E. 277, 44 N. E. 17, 32 L. R. A. 298, 57 Am. St. Rep. 185; In re Billis' Will, 122 La. 539, 47 South. 884, 129 Am. St. Rep. 355; Boyd v. Boyd, 6 Gill & J. (Md.) 25; Cowley v. Knapp, 42 N. J. Law, 297; Tozer v. Jackson, 164 Pa. 373, 30 Atl. 400; Estate of Knox, 131 Pa. 220, 18 Atl. 1021, 6 L. R. A. 353, 17 Am. St. Rep. 798; Appeal of Scott, 147 Pa. 89, 23 Atl. 212, 30 Am. St. Rep. 713.

⁴¹ Morrell v. Dickey, 1 Johns. Ch. (N. Y.) 153.

See, also, Ehrenberg's Succession, 21 La. Ann. 280, 99 Am. Dec. 729; Clarke v. Ransom, 50 Cal. 595; Prather v. Prather, 97 Miss. 311, 52 South. 449; Cock v. Cooke, L. R. 1 P. & D. 241; Fosselman v. Elder, 98 Pa. 159; Towers v. Hogan, 23 L. R. (Ir.) 53.

⁴² In re Knowles' Estate, 8 Pa. Dist. R. 153, 22 Pa. Co. Ct. R. 302.

⁴³ In re Richardson's Estate, 94 Cal. 63, 29 Pac. 484, 15 L. R. A. 635.

properly executed, they will have this effect. Ordinarily they fail of this result because of defective execution.⁴⁴

Form of an Order

An instrument in the form of an order may operate as a will, if properly executed, if the interest created thereby is not to arise until after the maker's death. Thus an indorsement on the back of a note, written and signed by the payee, "If I am not living at the time this note is paid, I order the contents to be paid to Arad Hunt 2nd," was held to be a testamentary writing, and entitled to probate, under the statute.⁴⁵

Miscellaneous Forms

So instruments in the form of marriage settlements,⁴⁶ drafts on bankers,⁴⁷ receipts for stock and bills, indorsed "For A. B.,"⁴⁸ checks and stubs in a check book,⁴⁹ have been held to be testamentary.

⁴⁴ *Cover v. Stem*, 67 Md. 449, 10 Atl. 231, 1 Am. St. Rep. 406; *In re Sunday's Estate*, 167 Pa. 30, 31 Atl. 353; *Woodbridge v. Spooner*, 3 B. & Adolph. 233.

An indorsement by payee of a note transferring it to another, but reserving to indorser sole power to collect during his life, being witnessed by two, is a will. *Morrison v. Bartlett*, 148 Ky. 833, 147 S. W. 761, 41 L. R. A. (N. S.) 39.

⁴⁵ *Hunt v. Hunt*, 4 N. H. 434, 17 Am. Dec. 434; *Cudworth v. Beech*, 4 Ves. 565 (semble).

So the following writing, addressed by the owner of certain bonds to the bankers having them in custody, was held to be testamentary in its character: "Gents, of the 730 government bonds of mine in your hands, hereby assign to my wife H. C. \$6000, she to draw the interest of the same, you keeping possession of the same. * * * My wife to draw the interest till her death, to have no control of the principal so far as disposing of them is concerned—the bonds at her death to revert to my heirs. The above assignment to take effect at my death, I controlling them in the meantime." *Comer v. Comer*, 120 Ill. 420, 11 N. E. 848; *Grand Fountain U. O. T. R. v. Wilson*, 96 Va. 594, 32 S. E. 48 (semble); *Remington v. Bank*, 76 Md. 546, 25 Atl. 666 (semble).

See, also, *Knight v. Tripp*, 121 Cal. 674, 54 Pac. 267; *Murdock v. Bridges*, 91 Me. 124, 39 Atl. 475; *Flanagan v. Nash*, 185 Pa. 41, 39 Atl. 818.

⁴⁶ *Passmore v. Passmore*, 1 Phil. 218. See, also, *Goods of Knight*, 2 Hagg. 554.

⁴⁷ *Bartholomew v. Henley*, 3 Phil. 317; *Gladstone v. Tempest*, 2 Curt. 650; *Jones v. Nicholay*, 2 Robert. 288; *Goods of Marsden*, 1 Sw. & Tr. 542.

⁴⁸ *Sabine v. Goate*, cited in 2 Hagg. 247.

⁴⁹ *In re Lambaert's Estate*, 10 Pa. Co. Ct. R. 10. Here the testatrix, after executing a will and codicil, drew three checks payable to the order of her daughters, and signed them, but left them undetached from her checkbook, which she kept until her death. On the stub of one of the checks were written these words: "Drawn to the order of Sallie E. Lambaert—being exceeding ill at the time these checks were drawn. If I get well, they must not get the money; if I do not, I will be most glad it will come into their possession." Held, that the checks and stub should be probated as a codicil to the will,

Informal Wills

So a will may assume the form of any instrument, or be absolutely informal; all that is required is the disclosure of testamentary intent and proper execution. Thus a writing, not in the form of a will, but reciting, "A few little things I would love to have done," and addressed to no one by name, is the will of the maker;⁵⁰ as is also a signed writing on the back of a gas receipt, in the handwriting of the deceased, saying, "It is my wish," followed by a schedule of property to be distributed among specified persons.⁵¹ So, where there was found pasted upon a tin box a paper containing the words: "In case of my death I want this box given to my attorney, A. K. Stevenson, 439 Grant St., Pittsburg, Pa. G. T. Jacoby;" and the box contained envelopes inclosing securities upon which were indorsements of this character, "This is to go to Mrs. Mary Downs and her family"—the inscription on the box and its contents were admitted to probate as a will;⁵² as was also a paper reading, "This writing is instead of a formal will which I intend to make. After my mother's death, my cousin, S., is my heir"—signed by decedent and two attesting witnesses.⁵³ On the back of a business letter was the following: "Ann: After my death you are to have forty thousand dollars; this you are to have, will or no will, take care of this until my death"—directed to Eliza Ann Byers. This was held to be a will.⁵⁴ Instances might be multiplied, but these are sufficient to show the entire lack of restraint imposed upon a testator with regard to the form in which he shall express his testamentary intention.⁵⁵

there being a sufficient compliance with the statutory requirement of signature at the end of the will.

⁵⁰ In *re Knox's Estate*, 131 Pa. 220, 18 Atl. 1021, 6 L. R. A. 353, 17 Am. St. Rep. 798.

⁵¹ In *re Gaston's Estate*, 188 Pa. 374, 41 Atl. 529, 68 Am. St. Rep. 874. See, also, *Tozer v. Jackson*, 164 Pa. 373, 30 Atl. 400.

⁵² In *re Jacoby's Estate* (Pa.) 28 Pittsb. Leg. J. (N. S.) 17.

⁵³ In *re Beebe*, 6 Dem. Sur. (N. Y.) 43.

⁵⁴ *Byers v. Hoppe*, 61 Md. 206, 48 Am. Rep. 89.

⁵⁵ See ante, p. 17.

See, also, *Fosselman v. Elder*, 98 Pa. 159; *Tozer v. Jackson*, 164 Pa. 373, 30 Atl. 400; In *re Sullivan's Estate*, 130 Pa. 342, 18 Atl. 1120; *Reagan v. Stanley*, 11 Lea (Tenn.) 816; *Webster v. Lowe*, 107 Ky. 293, 53 S. W. 1030.

DUPLICATE AND PARTIAL WILLS

8. Sometimes, for greater security, a testator executes his will in duplicate, retaining one copy and committing the other to the custody of another person. In such case only one of the duplicates is admitted to probate.
9. Wills may be so framed as to operate only on property located in particular jurisdictions. Each will must then be probated in the proper jurisdiction.

The custom of executing wills in duplicate is much more common in England than in this country. Its desirability, however, is obvious, as it lessens greatly the risk of loss. As there is but one will, one copy only is probated.⁵⁶ Questions regarding duplicate wills arise most frequently in connection with the revocation of wills.⁵⁷ Reference is made to them here, as bearing upon the general subject of form.

Separate or Partial Wills

A testator sometimes executes separate wills of property located in various jurisdictions. This might be very convenient when the law of the different jurisdictions varies with regard to the formalities attendant upon the proper execution of wills. Where the intent clearly appears to keep the two or more classes of property distinct, each will should be probated in the proper jurisdiction, and neither jurisdiction should admit to probate the will operating upon real property in the other jurisdiction. But a memorandum or attested copy of the foreign will should be appended to the will offered for probate, that persons interested may have notice of the existence of the foreign will.⁵⁸ If, however, one will ratifies and confirms the other, both wills should be included in the probate.⁵⁹

Where there are separate instruments, operating as wills upon property, without regard to its location, and disposing of a portion to one party and a portion to another, they are all properly admitted to probate as the will of the testator.⁶⁰

⁵⁶ CROSSMAN v. CROSSMAN, 95 N. Y. 145, Dunmore Cas. Wills, 12.

⁵⁷ Post, p. 229.

⁵⁸ Goods of Callaway, 15 P. D. 147. See, also, In re Astor, L. R. 1 P. D. 150; In re Murray (1896) Prob. 65; Goods of Tamplin, 6 Reports, 533; Id., [1894] Prob. 39.

⁵⁹ In re Lockhart, 1 Rep. 481, 60 Law T. 21, 57 J. P. 313; In re Harris, L. R. 2 P. & D. 83; In re Howden, 43 L. J. Prob. 26; Goods of Crawford, P. D. (1890) 185.

⁶⁰ In re Grubb's Estate, 174 Pa. 187, 34 Atl. 573. See, also, In re Murphy's Estate, 104 Cal. 554, 38 Pac. 543; Fletcher v. Gates (Tex. Civ. App.) 63 S. W. 937.

INCORPORATION BY REFERENCE

10. If a will executed as required by statute incorporates in itself by reference any document or paper not so executed, whether the paper referred to be in the form of a will or codicil, or of a deed or indenture, or of a mere list or memorandum, the paper so referred to, if it was in existence at the time of the execution of the will, and is identified by clear and satisfactory proof as the paper referred to therein, takes effect as part of the will, and is admitted to probate as such.
11. In order that a separate document may thus be incorporated by reference in a will, three things are necessary:
- (a) The will must refer to some document as being then in existence in such a way as reasonably to identify said document and to show testator's intention to incorporate it.
 - (b) Proof must be made that the document thus referred to was actually in existence before the will was written.
 - (c) Proof must be made that the document thus sought to be incorporated is identical with that referred to in the will.

All the conditions above stated must be complied with; otherwise the paper referred to cannot take effect as part of the will.⁶¹

Although the doctrine stated in the text is generally accepted, the whole doctrine of incorporation by reference has been rejected in some cases in New York⁶² and has been seriously questioned in Connecticut.⁶³

It is to be observed at the outset, however, that the principles governing the incorporation of extrinsic documents by reference in a will apply only to such supplementary acts, evidenced by the

⁶¹ Keeler v. Merchants' Loan & Trust Co., 253 Ill. 528, 97 N. E. 1061; Schilling v. Bawek, 135 Iowa, 131, 112 N. W. 210; NEWTON v. SEAMAN'S FRIEND SOCIETY, 130 Mass. 91, 39 Am. Rep. 433, Dunmore Cas. Wills, 14; Parrott v. Avery, 159 Mass. 594, 35 N. E. 94, 22 L. R. A. 153, 38 Am. St. Rep. 465; Holmes v. Coates, 159 Mass. 226, 34 N. E. 190; Wells v. Hawes, 122 Mass. 97; Thayer v. Wellington, 9 Allen (Mass.) 283, 292, 85 Am. Dec. 753.

See Molineux v. Molineux, Cro. Jac. 144; Dexter v. Harvard College, 176 Mass. 192, 57 N. E. 371.

⁶² Kell v. Hoehn, 72 Misc. Rep. 255, 131 N. Y. Supp. 89; In re Emmons' Will, 110 App. Div. 701, 96 N. Y. Supp. 506; Booth v. Baptist Church, 126 N. Y. 215, 28 N. E. 238. Compare: Re Field, 204 N. Y. 448, 97 N. E. 881, 39 L. R. A. (N. S.) 1060, Ann. Cas. 1913C, 842.

⁶³ BRYAN'S APPEAL, 77 Conn. 240, 58 Atl. 748, 68 L. R. A. 353, 107 Am. St. Rep. 34, 1 Ann. Cas. 393, Dunmore Cas. Wills, 15; Phelps v. Robbins, 40 Conn. 250.

documents, as are testamentary in their character. If non-testamentary in their character, they may be done, and the written evidence of them prepared, as well after the making of the will as before. In such cases, there is no genuine incorporation by reference, but the subsequent non-testamentary act may be proved for the purpose of rendering certain, provisions of the will which at the time of its execution were uncertain. Thus where a testatrix devised realty to trustees, to be divided by them, after the death of a beneficiary for life, among the partners of the testatrix who should be in copartnership with her at the time of her decease, or to whom she might have disposed of her business, in such proportions as the trustees should deem fit, the devise was held to be unobjectionable, and the partners to whom she disposed of the business subsequent to the execution of the will were beneficiaries under the clause in the will above referred to. Her act in disposing of the business to her partners was in no sense testamentary; it merely rendered certain a previous complete testamentary disposition.⁶⁴ But if, in a will, a testator undertakes to reserve to himself the power to make a subsequent testamentary disposition of property by an instrument not to be executed as a will, such power must either be executed in compliance with the requirements of the statute respecting the execution of wills or must fail. Thus where a testator, by a duly executed will, devised to trustees all his property in the island of Grenada, in trust to discharge all legacies which he might thereafter make chargeable upon said property by any writings signed by him, whether witnessed or not, a subsequent unattested codicil giving to his wife an additional annuity chargeable upon his property in Grenada was held to be inoperative.⁶⁵ With this explanation, the requirements for incorporation by reference may be taken up in detail.

Document Must be Referred to as Existing

Since wills are ordinarily required by statute to be in writing, the document sought to be incorporated must be referred to either expressly or by necessary implication as in existence; otherwise the entire will would not, in terms, appear to meet the requirements of the statute.⁶⁶ References in a codicil "to my last will and testa-

⁶⁴ *Stubbs v. Largon*, 3 Myl. & C. 507.

⁶⁵ *Rose v. Cunynghame*, 12 Ves. 29. Accord: *Habergham v. Vincent*, 2 Ves. Jr. 204; *Wilkinson v. Adam*, 1 V. & B. 422; *Whytall v. Kay*, 2 My. & K. 765.

⁶⁶ *In re Soher*, 78 Cal. 477, 21 Pac. 8; *Crosby v. Mason*, 32 Conn. 482; *Fessler v. Simpson*, 58 Ind. 83; *Newton v. Society*, 130 Mass. 91, 39 Am. Rep. 433; *Booth v. Baptist Church*, 126 N. Y. 215, 247, 28 N. E. 238; *In re Baker's Appeal*, 107 Pa. 381, 52 Am. Rep. 478; *Allen v. Boomer*, 82 Wis. 364, 370, 52 N.

ment," the latter being invalid for want of proper attestation,⁶⁷ in a will to lands conveyed to the testator by a certain indenture, specifying the deed,⁶⁸ or to a deed as dated and made,⁶⁹ or to a schedule as annexed to the will,⁷⁰ are sufficiently definite with regard to the existence of the document to incorporate it with the instrument in which the reference thereto is made.

But a bequest in a will referring to such personal property "as shall be ticketed or may be described in a paper in my own handwriting,"⁷¹ or to such articles "as are contained in the inventory signed by me and deposited herewith,"⁷² or to residuary legatees "to be appropriated by them as specified in my letter,"⁷³ does not necessarily refer to an existing document, and hence the document referred to cannot be regarded as incorporated by reference. And, when a document is not referred to in the will as existing, parol evidence cannot be received to show that it actually did exist when the will was made.⁷⁴ For the will is required to be in writing, and that fact must be disclosed upon its face. If the instrument itself, by its own terms, is not wholly in writing (and such is the result of an attempted incorporation of a document not described or referred to as existing), the will itself proclaims its own partial invalidity, and parol evidence cannot be received to alter the legal import of the will. To receive such evidence would be to give, by parol testimony, a different effect to the instrument from that which it, of itself, purports to have, in view of the requirement that the will shall be in writing; in other words, the legal effect of the will would be varied by parol evidence, which is to effect the very

W. 426; *Allen v. Maddock*, 11 Moo. P. C. 427; *Goods of Sunderland*, L. R. 1 P. & D. 198; *In re Kehoe*, L. R. 13 Ir. 13; *Goods of Truro*, L. R. 1 P. & D. 201; *Durham v. Northen*, L. R. 1 P. & D. 66.

It is submitted that if the reference is such as to render the document capable of identification, but the words used could refer equally well either to a future or a past document, parol evidence should be admissible to show that testator referred to an existing document. The cases, however, seem to require a reference to a document as *then* existing. *Magnus v. Magnus*, 80 N. J. Eq. 346, 84 Atl. 705; *Goods of Sunderland*, L. R. 1 P. & D. 198.

⁶⁷ *Allen v. Maddock*, 11 Moo. P. C. 427; *Doe dem. Williams v. Evans*, 1 Cr. & Mees. 42; *Goods of Heathcote*, 6 P. D. 30.

⁶⁸ *Habergham v. Vincent*, 2 Ves. Jr. 204; *Molineux v. Molineux*, Cro. Jac. 144.

⁶⁹ *Ogsbury v. Ogsbury*, 115 N. Y. 290, 22 N. E. 219.

⁷⁰ *Goods of Willesford*, 1 Notes Cas. 404.

⁷¹ *Goods of Sunderland*, L. R. 1 P. & D. 198.

⁷² *Goods of Truro*, L. R. 1 P. & D. 201 (dictum).

⁷³ *Goods of Mary Reid*, 38 L. J. (N. S.) P. & M. 1.

⁷⁴ *Durham v. Northen*, [1895] Prob. 66, 6 Rep. 582; *Goods of Sunderland*, L. R. 1 P. & D. 198.

thing that the statute requiring wills to be in writing was designed to render impossible.

Definiteness of Reference Necessary

To incorporate an extrinsic paper into a will by reference, the description of the paper in the will must be in clear and definite terms and must not be so vague as to be incapable of being applied to any instrument in particular.⁷⁵

Intention to Incorporate Essential

An instrument may be incorporated into a will only when the language used in the will manifests an intention that such shall be done.⁷⁶

Document Must be Shown to be Existing

Not only must the will refer to the document sought to be incorporated as existing, but such must be shown to have been actually the case.⁷⁷ This is by reason of the requirement that wills must be in writing at the time of their execution. If proof of the existence of the document were not required, a testator could substantially evade the provision of the statute regarding the execution of wills by referring in his will to a document as existing, which he might subsequently prepare at his leisure.

It is well settled, however, that the execution of a codicil referring to a prior will effects a republication of the will equivalent to execution de novo; that it brings the will down to the date of the republication as effectually as though it were itself executed at that time.⁷⁸ Hence a codicil, properly executed, and referring to a will, defectively executed or which had been altered after execution, effects, by the doctrine of incorporation, a republication so as to render the will operative in its altered or defectively executed form.⁷⁹

⁷⁵ APPEAL OF BRYAN, 77 Conn. 240, 58 Atl. 748, 68 L. R. A. 353, 107 Am. St. Rep. 84, 1 Ann. Cas. 393, Dunmore Cas. Wills, 15; Hartwell v. Martin, 71 N. J. Eq. 157, 63 Atl. 754. A bequest to one of property "to dispose of in accordance with my instructions to her," is insufficient; such reference not identifying the instructions. Magnus v. Magnus, 80 N. J. Eq. 346, 84 Atl. 705.

⁷⁶ Hunt v. Evans, 134 Ill. 496, 25 N. E. 579, 11 L. R. A. 185; Zimmerman v. Hafer, 81 Md. 347, 32 Atl. 316; Chambers v. McDaniel, 28 N. C. 226.

⁷⁷ In re Shillaber's Estate, 74 Cal. 144, 15 Pac. 453, 5 Am. St. Rep. 433; Hunt v. Evans, 134 Ill. 496, 25 N. E. 579, 11 L. R. A. 185; Thayer v. Wellington, 9 Allen (Mass.) 283, 85 Am. Dec. 753; Langdon v. Astor's Ex'rs, 16 N. Y. 9; Vestry of St. John's Parish v. Bostwick, 8 App. D. C. 452.

The document referred to need not, however, be present at the time of execution of the will. In re Willey's Estate, 128 Cal. 1, 60 Pac. 471.

⁷⁸ 1 Wms. Executors (Perk. Ed.) 216; Skinner v. Ogle, 4 Notes Cas. 79, Goods of Hunt, 2 Robert. 622; Goods of Stuart, 3 Sw. & Tr. 192; Goods of Matthias, 3 Sw. & Tr. 100; Sheldon v. Sheldon, 1 Robert. 81.

⁷⁹ De Battle v. Lord Fingal, 16 Ves. 167; Carleton v. Griffin, 1 Burr. 549;

From this it follows that, although a document referred to as existing did not actually exist at the time of the making of the will, yet if, between this time and that of the execution of a subsequent codicil, the document comes into existence it thereby is incorporated by reference, by virtue of the fact that the will then speaks from the time of the execution of the codicil, at which time the document was in existence. In short, if the will, treated as executed at the date of the codicil, contains language sufficient to effect the incorporation of a document within the principles already laid down, testamentary effect may be given to such document; otherwise not.⁸⁰ Thus, if the will, regarded as speaking at the date of the codicil, refers to the document sought to be incorporated as not in existence, it cannot be considered as incorporated, although actually in existence.⁸¹

Parol Evidence to Identify Document

A reference to a document in a will may be in such terms as to exclude parol testimony to establish its identity, as where it is to papers not yet written, or where the description is so vague as to be incapable of being clearly applied to any instrument in particular. But where there is a reference in a duly attested testamentary instrument to another instrument in such terms as to make it capable of identification, parol evidence may be received to effect the identification. When the parol evidence sufficiently proves that, in the existing circumstances, there is no doubt as to the instrument, it is no objection to it that, by possibility, circumstances might have existed in which the instrument referred to could not have been identified.⁸² Parol evidence may be received to establish

Doe dem. Williams v. Evans, 1 Cr. & Mees. 42; *Guest v. Willasey*, 12 J. B. Moo. 2; *Aaron v. Aaron*, 3 De G. & S. 475; *Allen v. Maddock*, 11 Moo. P. C. 427; *In re Smith*, 2 Curt. 796; *Shaw v. Camp*, 163 Ill. 144, 45 N. E. 211, 36 L. R. A. 112; *Harvey v. Chouteau*, 14 Mo. 587, 55 Am. Dec. 120; *Skinner v. Society*, 92 Wis. 209, 65 N. W. 1037.

⁸⁰ *Goods of Truro*, L. R. 1 P. & D. 201; *In re Rendle*, 68 Law J. Prob. 125.

⁸¹ *Goods of Sunderland*, L. R. 1 P. & D. 198.

⁸² *Lord Kingsdown in Allen v. Maddock*, 11 Moo. P. C. 427. Here the testatrix made a will, invalid through lack of proper attestation. Later, she made a codicil, headed, "This is a codicil to my last will and testament." Held, that the reference to the will in the codicil was sufficiently distinct to enable the court to receive parol evidence to identify it.

See, also (accord) *Goods of Greves*, 1 Sw. & Tr. 250; *Goods of Almosino*, 1 Sw. & Tr. 508; *Goods of McCabe*, 2 Sw. & Tr. 478; *Dickinson v. Stidolph*, 11 C. B. (N. S.) 341; *Van Straubenzee v. Monck*, 3 Sw. & Tr. 6; *Goods of Luke*, 34 L. J. (N. S.) P. M. & A. 105; *Goods of Daniels*, 8 P. D. 14; *Phelps v. Robbins*, 40 Conn. 250, 272.

Parol evidence cannot be received to supply deficiencies in identification. *Schillinger v. Bawek*, 135 Iowa, 131, 112 N. W. 210.

all the relevant circumstances of the case, so that the court may place itself, as far as possible, in the situation of the testator.⁸³ If the language of the will, read in the light of these circumstances, clearly identifies the document referred to, it thereby becomes incorporated; otherwise not.⁸⁴

Whether a reference on one page of a will to a succeeding page, such as "See next page," will be sufficient to incorporate the contents of the page referred to into the preceding portions containing the testator's signature, is a matter of doubt. Under a statute requiring wills to be signed by the testator at the end thereof, the New York court has held that such subsequent portion cannot be treated as a part of the will.⁸⁵ But in Pennsylvania, in construing a similar statute, an opposite conclusion has been reached.⁸⁶ The doctrine of incorporation by reference should apply only to documents which are not an integral part of the will. In the case suggested, the writing following the signature was intended by testator to be part of will itself. The holding of the New York court therefore logically might be followed in jurisdictions which permit incorporation by reference of extrinsic documents.

The burden of establishing the identity of the document sought to be incorporated is upon the party who alleges it,⁸⁷ and such identity must be established so as to preclude all reasonable proba-

⁸³ *Goods of Almosino*, 1 Sw. & Tr. 508.

⁸⁴ Decedent left two papers, each in a sealed envelope, with an indorsement that it was testatrix's will. The first paper gave the brother and sister of testatrix the use of her property for life, "remainder to persons named on another sheet, and inclosed in another envelope, which shall not be opened until after the death of my said brother and sister." Indorsed on the envelope containing the second paper was a statement that it should not be opened until after the death of the brother and sister of the testatrix. Both papers bore date on the same day, and were executed in due form. The second paper, which did not refer to the first, was held not to be sufficiently identified as that referred to in the first, and could not, therefore, be taken as part of the will.

As illustrative of the application of the same principle, see *In re Young's Estate*, 123 Cal. 337, 55 Pac. 1011; *Garnett's Estate* (1894) Prob. 90; *Phelps v. Robbins*, 40 Conn. 250; *Goods of Greves*, 1 Sw. & Tr. 250; *Bailey v. Bailey*, 52 N. C. 44; *Goods of Marchant* (1893) Prob. 254; *In re Andrews' Will*, 162 N. Y. 1, 56 N. E. 529, 48 L. R. A. 662, 76 Am. St. Rep. 294, 30 Civ. Proc. R. 377.

⁸⁵ *In re Andrews' Will*, 162 N. Y. 1, 56 N. E. 529, 48 L. R. A. 662, 76 Am. St. Rep. 294; *In re Whitney's Will*, 153 N. Y. 259, 47 N. E. 272, 60 Am. St. Rep. 616; *In re Conway*, 124 N. Y. 455, 26 N. E. 1028, 11 L. R. A. 796; *Sisters of Charity of St. Vincent de Paul v. Kelly*, 67 N. Y. 409.

⁸⁶ *In re Baker's Appeal*, 107 Pa. 381, 52 Am. Rep. 478. See, also, *Goods of Greenwood* (1892) Prob. 7; *Goods of Brit*, 24 L. T. R. 142.

⁸⁷ *Singleton v. Tomlinson*, 3 App. Cas. 404.

bility of mistake.⁸⁸ If the instrument referred to in the will, upon identification, is found to contain nothing, the paper is disregarded and the will is otherwise valid.⁸⁹ Probate of a duly executed will cannot be denied on the ground that it is not the whole will merely because of the failure of an attempted incorporation.⁹⁰

Where a document referred to in the will is lost or missing, there is a *prima facie* presumption that it was destroyed by the testator with intent to revoke the will in so far as such document constituted a part thereof, and the will takes effect as though no reference had been made to it.⁹¹ But this presumption being once overcome, there is apparently no reason why the usual rule in the case of lost instruments should not apply and evidence of its contents be received.

In view of the requirement that wills be in writing, oral instructions cannot be incorporated by reference.⁹²

⁸⁸ *Allday v. Cage* (Tex. Civ. App.) 148 S. W. 838.

⁸⁹ *Handley v. Palmer* (C. C.) 91 Fed. 948.

⁹⁰ *In re Reins' Estate*, 59 Misc. Rep. 126, 112 N. Y. Supp. 203.

⁹¹ *Dickinson v. Stidolph*, 11 O. B. (N. S.) 341; *Wood v. Sawyer*, 61 N. C. 251.

⁹² *Olliffe v. Wells*, 130 Mass. 221; *Goods of Marchant* (1893) Prob. 254.

CHAPTER III

FORM OF WILLS (Continued)—NUNCUPATIVE—HOLOGRAPHIC—CONDITIONAL WILLS

- 12-13. Nuncupative Wills—Definition—History.
- 14. Nuncupative Wills of Soldiers and Sailors.
- 15. Nuncupative Wills Pass Title to Personalty Only.
- 16. Nuncupative Wills in Louisiana.
- 17. Holographic Wills.
- 18. Conditional Wills.

NUNCUPATIVE WILLS—DEFINITION—HISTORY

- 12. A nuncupative will is an oral will declared by the testator before witnesses.
- 13. Historically, wills of this character have passed through three periods:
 - (a) That preceding the enactment of the statute of frauds, during which the oral declarations of any competent person as to his testamentary wishes in such manner as to be capable of proof, if made in extremis, were valid.
 - (b) That intervening between the enactment of the statute of frauds and the statute of wills, of 1 Victoria, during which wills of this character were valid only when made under certain circumstances, and in the presence of a fixed number of witnesses, excepting from its operation mariners at sea, soldiers in actual service, and testators disposing of estates of £30 or less.
 - (c) That following the passage of the last-named statute, by which the power to make wills of this character was confined to sailors at sea and soldiers in actual service.

As has already been seen,¹ wills of personal property were not originally required to be in writing. Had such been the case, well-nigh universal intestacy would have resulted, by reason of the general ignorance of the art of writing. But with the decrease of illiteracy, the necessity for recognizing oral wills disappeared, and in view of the uncertainty existing in their very nature, and the opportunities for fraud and perjury which they afforded, nuncupative wills came to be regarded with growing disfavor, and were apparently refused probate except when good reasons were shown for

¹ Ante, p. 31.

failure to reduce the testator's wishes to writing. The only reason which could ordinarily exist was that the testator, overtaken by sudden and mortal illness, had no time for the preparation and formalities of a written instrument. Hence, by the time of Henry VIII, it appears to have become the settled rule that a nuncupative will was valid only when made by the testator in extremis.²

Provisions of Statute of Frauds

Such was the state of the law on this subject when the statute of frauds was enacted.³ The nineteenth section, which contained the most important of the provisions relating to nuncupative wills, enacted "that no nuncupative will shall be good, where the estate thereby bequeathed shall exceed the value of thirty pounds, that is not proved by the oaths of three witnesses (at the least) that were present at the making thereof, nor unless it be proved that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, bear witness that such was his will, or to that effect; nor unless such nuncupative will were made in the time of the last sickness of the deceased; and in the house of his or her habitation or dwelling, or where he or she hath been resident for the space of ten days, or more, next before the making of such will, except where such person was surprised or taken sick, being from his own home, and died before he returned to the place of his or her dwelling."

² Thus Perkins in his book on Conveyancing (section 476), published in the reign of this King, defines a nuncupative will to be when the testator "lieth languishing for fear of sudden death, dareth not to stay the writing of his testament, and therefore he prayeth his curate, and others, his neighbors, to bear witness of his last will, and declareth by words what his last will is."

And Swinburne, writing in the reign of James I, says that "this kind of testament is commonly made when the testator is now very sick, weak, and past all hope of recovery." Wills, p. 32.

³ 29 Charles II, c. 3 (1677).

The case of *Cole v. Mordaunt*, 4 Ves. 196, occurring one year prior to its passage, is supposed to have led to the incorporation of the sections relating to nuncupative wills. The facts of the case were these: Mr. Cole, at an advanced age, married a young woman whose conduct, during his life, was, at least, indiscreet. After his death, she set up a nuncupative will, alleged to have been made in extremis, by which she was given by her husband his entire property, although, three years before, by a written will, he had disposed of his estate to charitable uses. Nine witnesses were offered to prove the nuncupative will, but probate was rejected, and at trial, on appeal, it appeared that most of the witnesses were perjured, and that Mrs. Cole had induced them to perjure themselves. The case is said to have suggested Lord Chancellor Nottingham's remark that "he hoped to see one day a law that no written will should ever be revoked but by a writing." Section 22 of the statute of frauds embodied this suggestion. See, on this general subject, *Prince v. Hazleton*, 20 Johns. (N. Y.) 502, 11 Am. Dec. 307.

Section 20 provides that "after six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony or the substance thereof, were committed to writing within six days after the making of the said will."

This statute is thus given at length because it has formed the basis for much similar legislation in the United States, though there are, of course, variations in the number of witnesses required, the length of time within which the testator's wishes must be reduced to writing, etc. It is proposed now to discuss in detail the principal requirements of these statutes.

It is to be observed, at the outset, that the language of statutes respecting nuncupative wills is construed strictly, and that all their provisions must be completely conformed with.⁴ "So little are nuncupative wills favorites with the ecclesiastical courts, that not only must all the provisions of the statute of frauds be strictly complied with, to entitle such a will to probate, * * * but the factum of a nuncupative will requires to be proved by evidence more strict and stringent than that of a written one in every single particular. This is requisite in consideration of the facilities with which frauds in setting up nuncupative wills are obviously attended."⁵

The burden of showing compliance with the statute is upon the proponent, and the evidence to this effect must be clear.⁶

Animus Testandi

In this, as in the case of all other wills, a fundamental requisite is the presence of testamentary intent,⁷ and the same principles

⁴ *Ridley v. Coleman*, 1 Sneed (Tenn.) 616; *Welling v. Owings*, 9 Gill (Md.) 467; *Lucas v. Goff*, 33 Miss. 629; *In re Grossman's Estate*, 75 Ill. App. 224; *Godfrey v. Smith*, 73 Neb. 756, 103 N. W. 450, 10 Ann. Cas. 1128; *Bennett v. Jackson*, 2 Phil. 190; *Lemann v. Bonsall*, 1 Add. 389.

Nuncupative wills are not favored in the law. *Mitchell v. Vickers*, 20 Tex. 377; *Johnston v. Glasscock*, 2 Ala. 218.

⁵ 1 Wms. Ex'rs, 122.

⁶ *Scaife v. Emmons*, 84 Ga. 619, 621, 10 S. E. 1097, 20 Am. St. Rep. 383; *Weir v. Chidester*, 63 Ill. 453; *Morgan v. Stevens*, 78 Ill. 287; *Mulligan v. Leonard*, 46 Iowa, 692; *Biddle v. Biddle*, 36 Md. 630; *Parkison v. Parkison*, 12 Smedes & M. (Miss.) 672.

Evidence in support of a nuncupative will should be closely scrutinized. *Isham v. Bingham*, 126 Ill. App. 513.

⁷ *IN RE MALE'S WILL*, 49 N. J. Eq. 266, 24 Atl. 370, *Dunmore Cas. Wills*, 20; *Knox v. Richards*, 110 Ga. 5, 35 S. E. 295.

Thus expressions of regret that the testator had made no will, together with the statement of the sort of a will he would have made, do not constitute a nuncupative will. *In re Wiley's Estate*, 187 Pa. 82, 40 Atl. 980, 67 Am. St. Rep. 569.

control in this regard as elsewhere. Thus a paper stating that, several times before the death of the deceased, he "spoke about making a will," and "how he wanted it written," does not show a nuncupative will.⁸

So declarations made solely for the purpose of having a written will prepared, and not with the intent and design that the words spoken should themselves operate as a testamentary disposition of the decedent's property, do not constitute a nuncupative will.⁹ And this is true though all the formalities essential to a valid nuncupative will are present.¹⁰ For an intention to make a written will is obviously not an intention to make an oral one. For the same reason, a written will, invalid as such by reason of defective execution, cannot, on principle and by weight of authority, be given effect as a nuncupative will.¹¹ It has, however, been held in some jurisdictions that instructions for the drawing up of a written will, declared before the requisite number of witnesses, may be received and proved as a nuncupative will, where the testator is, by the act of God, rendered incapable of completing his will in the mode contemplated by him.¹²

Last Sickness

Statutes generally provide, after the manner of the statute of frauds, that wills of this character, in order to be valid, must be made during the "last sickness" of the testator. The most general and unquestionably the preferable rule is that the will must be made not only during the sickness which terminated in the testator's death, but that it must be made at such a point in the sickness when, by reason of the apparent imminence of death, there is neither time nor opportunity to make a written will. In other words, "last sickness" is construed to mean that the testator must be in ex-

⁸ In re Askins' Estate, 20 D. C. 12.

⁹ Knox v. Richards, 110 Ga. 5, 35 S. E. 295; IN RE MALE'S WILL, 49 N. J. Eq. 266, 24 Atl. 370, Dunmore Cas. Wills, 20; Donald v. Unger, 75 Miss. 294, 22 South. 803; In re Grossman's Estate, 175 Ill. 425, 51 N. E. 750, 67 Am. St. Rep. 219.

¹⁰ Porter's Appeal, 10 Pa. 254.

¹¹ Ellington v. Dillard, 42 Ga. 361; Tabler v. Tabler, 62 Md. 601; Dockum v. Robinson, 26 N. H. 372; IN RE MALE'S WILL, 49 N. J. Eq. 266, 24 Atl. 370, Dunmore Cas. Wills, 20; Kennedy v. Douglas, 151 N. C. 336, 66 S. E. 216; Hunt v. White, 24 Tex. 643; Winn v. Bob, 3 Leigh (Va.) 140, 23 Am. Dec. 258; Reese v. Hawthorn, 10 Grat. (Va.) 548.

¹² Frierson v. Beall, 7 Ga. 438; Offutt v. Offutt, 3 B. Mon. (Ky.) 162, 38 Am. Dec. 183; Boofter v. Rogers, 9 Gill (Md.) 44, 52 Am. Dec. 680; Parkison v. Parkison, 12 Smedes & M. (Miss.) 672; Aurand v. Wilt, 9 Pa. 54; Guthrie v. Owen's Heirs, 10 Yerg. (Tenn.) 339; Phoebe v. Boggess, 1 Grat. (Va.) 129, 42 Am. Dec. 543.

tremis.¹³ The testamentary intent must manifest itself in nuncupative form from necessity, not from choice,¹⁴ and in fear that death is at hand.¹⁵ Thus an alleged nuncupative will cannot be admitted to probate, made by the testatrix during her last illness, nine days before her death, where there is clear proof that she had time and capacity to subsequently make a written will, had she so desired.¹⁶ So a nuncupative will, made four hours before the testator's death, was refused probate, it appearing that his physical and mental condition would have admitted of a will in writing, and that death occurred unexpectedly.¹⁷ But the mere fact that physicians had warned a decedent to settle his affairs in sufficient time to have enabled him to do so by a written will will not disable him from making a nuncupative will, if, through misplaced confidence in his ability to recover, he postpones so doing until there is no time to execute a written will.¹⁸

The general rule prevents the too easy avoidance of the safeguards surrounding a written will. But some courts have taken a more liberal view in construing the statute, holding that a nuncupative will made at any time during the last sickness is valid, if made by one impressed with the probability of death, regardless of the question as to whether, under the circumstances, there was opportunity for the execution of a written will.¹⁹

¹³ *In re Askins' Estate*, 20 D. C. 12; *Bellamy v. Peeler*, 96 Ga. 467, 23 S. E. 387; *Scaife v. Emmons*, 84 Ga. 619, 10 S. E. 1097, 20 Am. St. Rep. 383; *Mulligan v. Leonard*, 46 Iowa, 692; *O'Neill v. Smith*, 33 Md. 569; *Donald v. Unger*, 75 Miss. 294, 22 South. 803; *Carroll v. Bonham*, 42 N. J. Eq. 625, 9 Atl. 371; *Prince v. Hazleton*, 20 Johns. (N. Y.) 502, 11 Am. Dec. 307; *In re Rutt's Estate*, 200 Pa. 549, 50 Atl. 171; *Haus v. Palmer*, 21 Pa. 296; *In re Wiley's Estate*, 187 Pa. 82, 40 Atl. 980, 67 Am. St. Rep. 569; *Moffett v. Moffett*, 67 Tex. 642, 4 S. W. 70; *Reese v. Hawthorn*, 10 Grat. (Va.) 548; *Brunson v. Burnett*, 1 Chand. (Wis.) 136.

¹⁴ *Scaife v. Emmons*, 84 Ga. 619, 10 S. E. 1097, 20 Am. St. Rep. 383; *In re Munhall's Estate*, 234 Pa. 169, 83 Atl. 66; *Mellor v. Smyth*, 220 Pa. 169, 69 Atl. 592.

¹⁵ *In re Rutt's Estate*, 200 Pa. 549, 50 Atl. 171.

¹⁶ *Carroll v. Bonham*, 42 N. J. Eq. 625, 9 Atl. 371.

¹⁷ *In re Conaughton's Will*, 11 Pa. Co. Ct. R. 460. It is possible that, had the decedent been in immediate apprehension of death at the time of making his declarations, the decision here would have been different.

¹⁸ *In re Wiley's Estate*, 187 Pa. 82, 40 Atl. 980, 67 Am. St. Rep. 569.

¹⁹ *Johnston v. Glasscock*, 2 Ala. 242; *Harrington v. Stees*, 82 Ill. 50, 25 Am. Rep. 290; *Baird v. Baird*, 70 Kan. 564, 79 Pac. 163, 68 L. R. A. 627, 3 Ann. Cas. 312; *Godfrey v. Smith*, 73 Neb. 756, 103 N. W. 450, 10 Ann. Cas. 1128; *Nolan v. Gardner*, 7 Heisk. (Tenn.) 215; *Gwin v. Wright*, 8 Humph. (Tenn.) 639; *In re Miller's Estate*, 47 Wash. 253, 91 Pac. 967, 13 L. R. A. (N. S.) 1092, 125 Am. St. Rep. 904, 14 Ann. Cas. 1163.

Place Where Nuncupative Will must be Made

Statutes in conformity to the provisions of the statute of frauds²⁰ require that a nuncupative will must be made in the house of the habitation of the testator, unless he is surprised or taken sick away from home, and dies before returning. If the excepted case is "where the deceased is taken sick from home and dies," instead of being "surprised or taken sick," as was the wording of the English statute, a testator who leaves home, seriously ill, and dies while away, may make a valid nuncupative will at the place of his death.²¹

Rogatio Testium

The statute of frauds required the testator executing a nuncupative will "to bid the persons present, or some of them to bear witness that such was his will, or to that effect."²² This corresponds to the rogatio testium of the civil law. American statutes, as a rule, either expressly or by implication, make an oral request necessary, though no form of words is ordinarily prescribed.²³ Substantial conformity with the requirements of the statute in this regard is rigorously exacted. The desire of the testator that the parties requested bear witness to the will must be unequivocally manifested, though the exact words of the statute need not be employed.²⁴ Thus a request to the persons present that his friends who are to have his property should be informed,²⁵ and a statement that he wishes to make a disposition of his effects, have been held sufficient.²⁶ But a mere statement of testamentary wishes is not enough. There must be something equivalent to a request that witnesses shall take notice of them as such. Thus a declaration: "Everything is to go to Willie. I want Willie to have everything. I intended to fix it so that there would be no trouble, but it was put off"—unaccompanied by any request to witnesses, is inoperative.²⁷

²⁰ Ante, p. 45.

²¹ Marks v. Bryant, 4 Hen. & M. (Va.) 91; Gwin v. Wright, 8 Humph. (Tenn.) 639.

²² Section 19, supra, p. 45.

²³ 1 Underhill, Wills, § 169.

²⁴ In re Grossman's Estate, 75 Ill. App. 224.

See, also, In re Rutt's Estate, 200 Pa. 549, 50 Atl. 171; In re Wiley's Estate, 20 Pa. Co. Ct. R. 389; Id., 6 Pa. Dist. R. 691; In re Askins' Estate, 20 D. C. 12; Harrington v. Stees, 82 Ill. 50, 25 Am. Rep. 290; Godfrey v. Smith, 73 Neb. 756, 103 N. W. 450, 10 Ann. Cas. 1128.

²⁵ Gwin v. Wright, 8 Humph. (Tenn.) 639.

²⁶ Baker v. Dodson, 4 Humph. (Tenn.) 342, 40 Am. Dec. 650.

In Baird v. Baird, 70 Kan. 564, 79 Pac. 163, 68 L. R. A. 627, 3 Ann. Cas. 312, the statement by testator to witnesses, "I want you to see that it [the verbal will] is carried out the way I want it to be," was held a sufficient rogatio testium.

²⁷ In re Wiley's Estate, 187 Pa. 82, 40 Atl. 980, 67 Am. St. Rep. 569. For

A general request to the parties present at the declaration of the testamentary wishes to bear witness thereto, without specifying any particular individuals, is sufficient;²⁸ and this though the statute provides that the witnesses must state that they were specially required to bear witness thereto by the testator himself.²⁹

The required number of witnesses must, however, be present at the same time. A declaration made to witnesses separately and at different times is not sufficient.³⁰

In Ohio the two witnesses to a nuncupative will required by statute must be competent and disinterested witnesses at the time of the attestation, and their disqualification by reason of interest under the will cannot be removed by a renunciation thereof at the time of probate, nor does the provision of statute rendering a devise to the witness of a will void, and enabling the witness to testify to the execution of the will, apply to the case of a nuncupative will.³¹

Number of Witnesses

By the statute of frauds, a nuncupative will was required to be proved by the oaths of at least three witnesses.³² Consequently, if one of the three died prior to the probate, the will could not be proved.³³ In the United States, where wills of this character are recognized, three witnesses are sometimes required,³⁴ though two is the more usual number, and some statutes make no express provision as to the number of witnesses.³⁵ As the will must be proved by the witnesses, they must agree as to its provisions; otherwise probate is impossible.³⁶

analogous cases, see *In re Hebden's Will*, 20 N. J. Eq. 473; *Dockum v. Robinson*, 26 N. H. 372; *Bennett v. Jackson*, 2 Phil. 190.

²⁸ *Bradford v. Clower*, 60 Ill. App. 55, where the testatrix, after stating the disposition which she wished made of her property, raised her hands, addressed generally those about her, and said: "You all know now what I want done. That is all I have got to say."

²⁹ *Long v. Foust*, 109 N. C. 114, 13 S. E. 889, construing Code N. C. 1883, § 2148, par. 3. Here a nuncupative will was declared in the presence of several competent witnesses, and the testator, without naming them, called on all present to witness his will, and they heard and took notice.

³⁰ *IN RE MALE'S WILL*, 49 N. J. Eq. 266, 24 Atl. 370, *Dunmore Cas. Wills*, 20; *Bundrick v. Haygood*, 106 N. C. 468, 11 S. E. 423; *In re Yarnall's Will*, 4 Rawle (Pa.) 46, 26 Am. Dec. 115; *Tally v. Butterworth*, 10 Yerg. (Tenn.) 501.

³¹ *Vrooman v. Powers*, 47 Ohio St. 191, 24 N. E. 267, 8 L. R. A. 39.

³² Ante, p. 45.

³³ 1 Eq. Cas. Abr. 401. See 1 Wms. Ex'rs, 121.

³⁴ Such is the case in Maine, New Hampshire, New Jersey, Texas, and Wisconsin.

³⁵ There being no provision as to number of witnesses, two were required in *Johnston v. Glasscock*, 2 Ala. 218.

³⁶ *Bolles v. Harris*, 34 Ohio St. 38; *Mitchell v. Vickers*, 20 Tex. 377.

Reduction to Writing.

The statute of frauds required that nuncupative wills should be reduced to writing within six days after they were declared; otherwise probate must be had within six months after the oral declaration;³⁷ and similar legislation, with some variation as to time, is usual in the United States.³⁸ This requirement is mandatory, and no excuse for not proceeding within the time limited can avail.³⁹

The writing must set forth substantially the same words as those spoken by testator.⁴⁰

Repeal of Written Will by Nuncupative Will

The statute of frauds enacted that no will in writing shall be repealed, nor shall any clause therein be changed by any words or will by word of mouth only, except the same shall be in the life of the testator committed to writing, and, after the writing thereof, read unto the testator and allowed by him, and proved to be so done by three witnesses.⁴¹

Statutory provisions in the United States usually prevent the revocation of a written will by a nuncupative will.⁴²

NUNCUPATIVE WILLS OF SOLDIERS AND SAILORS

14. Oral wills of sailors at sea and soldiers in actual service were, in terms, excepted from the operation of the statute of frauds. In many jurisdictions the oral wills of these classes of persons are recognized as valid without subsequent reduction to writing, without any specified number of witnesses, and generally without being made in extremis.

Wills made by "any soldier in actual military service, or any mariner or seaman being at sea," were expressly excepted from the operation of the provisions of the statute of frauds relating to nuncupative wills.⁴³ The statute of wills (1 Vict. c. 26) rendered all nuncupative wills invalid, making, however, the same exception in favor of soldiers and sailors.⁴⁴

³⁷ Ante, p. 46.

³⁸ In re Haygood's Will, 101 N. C. 574, 8 S. E. 222.

³⁹ Martinez v. De Martinez, 19 Tex. Civ. App. 661, 48 S. W. 532.

⁴⁰ Bolles v. Harris, 34 Ohio St. 38.

⁴¹ 29 Car. II, ch. 3, § 22.

⁴² McCune's Devisees v. House, 8 Ohio, 144, 31 Am. Dec. 438; Brook v. Chappell, 34 Wis. 405.

⁴³ 29 Car. II, c. 3, § 23.

⁴⁴ "Any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done be-

Statutes to the same effect have been enacted in many of the American states.

Meaning of Terms

The term "soldier" comprehends every military grade from private to commander in chief, and includes generals, regimental and line officers, those assigned to field or staff duty, surgeons, all who hold commissions or warrants, or are borne on the rolls as enlisted men, and who are in actual military service.⁴⁵ The term embraces not only the fighting force, but also those who attend to the feeding and transportation of the army and to the care of the sick and wounded.⁴⁶

A soldier is in "actual military service" when he is engaged in an expedition,⁴⁷ i. e. when he is taking part in hostile operations, either offensive or defensive, against the enemy. If he is playing any part in a general scheme of military operations directed against an enemy, or is on his way to take such part, he is then sufficiently in service to make a valid nuncupative will. The nuncupative will of a soldier on his way from one regiment to another, both of which were in the field,⁴⁸ of an officer with his regiment which is about to start on a military expedition,⁴⁹ of a soldier ordered to the hospital when on the march to meet the enemy,⁵⁰ is valid. But a soldier is not in service when quartered with his regiment in barracks,⁵¹ or when at home on a furlough,⁵² or while on a tour of inspection of troops not engaged in warfare, under his command.⁵³

A sailor is any person engaged in the naval service, or employed in the merchant service, on shipboard, to minister to the purposes for which the voyage was undertaken; i. e., the safe transportation

fore the making of this act." 1 Vict. c. 26, § 11. See note on "Soldiers' and Seamen's Wills," 4 B. R. C. 899, for good collection of cases.

⁴⁵ *Goods of Donaldson*, 2 Curt. 386; *Leathers v. Greenacre*, 53 Me. 561; *Van Deuzer v. Gordon's Estate*, 39 Vt. 111; *Schoul. Wills*, § 366.

⁴⁶ *Ex parte Thompson*, 4 Bradf. Sur. (N. Y.) 154, 158.

⁴⁷ *Drummond v. Parish*, 3 Curt. 522. See, also, article on "Soldiers' Wills," 79 Cent. Law J. 388.

A person who has enrolled himself in a volunteer company, but has not yet been mustered into service, cannot make a nuncupative will as a soldier. *Pierce v. Pierce*, 46 Ind. 86.

⁴⁸ *Herbert v. Herbert*, Dea. & Sed. 10.

⁴⁹ *Goods of Thorne*, 29 Jur. 569.

Mobilization may be taken as a commencement of that which, in Roman law, was understood by the words "in expeditione." *Gattward v. Knee*, [1902] Prob. 99.

⁵⁰ *Gould v. Safford's Estate*, 39 Vt. 498.

⁵¹ *White v. Repton*, 3 Curt. 818.

⁵² *Smith's Will*, 6 Phil. 104.

⁵³ *Goods of Hill*, 1 Rob. 276.

of the cargo and passengers, and the care of the latter during the prosecution of the voyage. The term includes engineers, firemen, pursers, cooks, stewards, surgeons, and chaplains.⁵⁴ A vessel is regarded as "at sea" when ready to prosecute or engaged in prosecuting her voyage, though lying temporarily at anchor within the ebb and flow of the tide.⁵⁵ A sailor is "at sea," for the purposes of making a nuncupative will, when he is attached to a vessel thus circumstanced, though temporarily ashore on leave.⁵⁶ A properly made nuncupative will of a sailor is entitled to probate, although testator dies after he has landed.⁵⁷ There seems no reason why the same rule should not apply to a vessel, on her voyage, but lying alongside a wharf for a temporary purpose. It has been held that a mariner, while on the Mississippi river, is not within a statute allowing nuncupative wills to be made by "mariners while at sea."⁵⁸ If the ebb and flow of the tide is in all cases to be taken as the test as to whether a vessel is at sea, this decision is no doubt correct. But it is submitted that a ship may fairly be regarded as at sea when she is being navigated for the purposes of the voyage. There can be little doubt but that the presence of the tide was resorted to in England for the determination of this question because navigability was thus determined. But with the repudiation of the ebb and flow of the tide as a universal criterion of navigability in America, a more liberal rule in this regard should apply to nuncupative wills. To hold to the ancient doctrine is to hold that a sailor on the Great Lakes cannot, when overtaken by sudden danger, make an oral will, although the reasons for sustaining a will thus made are as strong in his case as in that of his fellow on the Atlantic.

⁵⁴ *Ex parte Thompson*, 4 Bradf. Sur. (N. Y.) 154.

See, also, *Goods of Hays*, 2 Curt. 338; *Goods of Milligan*, 2 Rob. 108; *HUBBARD v. HUBBARD*, 8 N. Y. 196, *Dunmore Cas. Wills*, 24.

⁵⁵ *HUBBARD v. HUBBARD*, 8 N. Y. 196, *Dunmore Cas. Wills*, 24; *Ex parte Thompson*, 4 Bradf. Sur. (N. Y.) 154; *In re Patterson*, 79 Law T. (N. S.) 123; *Goods of Rae*, L. R. 27 Ir. Ch. Div. 116.

A vessel permanently stationed at a port in the coast defense is "at sea." *Goods of McMurdo*, L. R. 1 P. & D. 540.

⁵⁶ *Goods of Lay*, 2 Curt. 375. In this case the unattested will of a seaman, who, while on board a vessel lying in the harbor of Buenos Ayres, obtained leave to go ashore, where he met with an accident, and, was thereby so severely injured that he died on shore, was admitted to probate. But the commander of a naval force, living on shore, at the official residence, with his family, is not sufficiently at sea to enable him to make a nuncupative will. See 1 *Wms. Ex'rs*, 154.

⁵⁷ *In re O'Connor's Will*, 65 Misc. Rep. 403, 121 N. Y. Supp. 903.

⁵⁸ *Gwin's Will*, Tuck. (N. Y.) 44.

Must Mariner or Soldier be in Extremis?

It is usually said that the general danger attaching to actual military service and to life at sea is sufficient to warrant the making of a nuncupative will, and that the sailor or soldier need not be in extremis or in fear of immediate death when making an oral will.⁵⁹ This is apparently true in the case of a soldier,⁶⁰ and what little authority there is supports the same view as applied to mariners.⁶¹ In Oklahoma, neither soldier nor sailor can make a will of this character except in actual contemplation of death, or in actual expectation of immediate death in consequence of sickness or injury.⁶²

NUNCUPATIVE WILLS PASS TITLE TO PERSONALTY ONLY

15. Wills, in so far as they operate on real property, must be in writing. A nuncupative will can operate only upon personalty, unless the statute expressly or by necessary implication provides otherwise.

As has been seen,⁶³ the legal title to land could not be disposed of by will, whether written or oral, prior to the passage of the statute of wills, which enabled lands to be devised by a will in writing. The provisions of the statute of frauds relative to nuncupative wills had no reference to wills of real property. While under a few early American statutes it was held that realty might pass under a nuncupative will,⁶⁴ it is now the general if not the universal rule that wills of this character are valid only in so far as they deal with personal property.⁶⁵ Even the income of realty cannot be disposed of

⁵⁹ 1 Underhill, Wills, § 176; Schoul. Wills, §§ 367, 370.

⁶⁰ See *Leathers v. Greenacre*, 53 Me. 561, 574; *Van Deuzer v. Gordon's Estate*, 39 Vt. 111.

⁶¹ *In re O'Connor's Will*, 65 Misc. Rep. 403, 121 N. Y. Supp. 903.

⁶² *Ray v. Wiley* (1902) 11 Okl. 720, 69 Pac. 809, a decision made necessary by Oklahoma statute.

⁶³ Ante, p. 6.

⁶⁴ *Ashworth v. Carleton*, 12 Ohio St. 381; *Gillis' Lessee v. Weller*, 10 Ohio, 462. Statute since changed. See Rev. St. Ohio 1910, § 10601.

⁶⁵ *McLeod v. Dell*, 9 Fla. 451; *Pierce v. Pierce*, 46 Ind. 86; *Palmer v. Palmer*, 2 Dana (Ky.) 391; *Campbell v. Campbell*, 21 Mich. 438; *Sadler v. Sadler*, 60 Miss. 251; *Maurer v. Reifschneider* (1911) 89 Neb. 673, 132 N. W. 197, Ann. Cas. 1912C, 643; *Cooper v. Pogue*, 92 Pa. 254, 37 Am. Rep. 681; *Johnson v. Johnson*, 92 Tenn. 559, 23 S. W. 114, 22 L. R. A. 179, 36 Am. St. Rep. 104; *Moffett v. Moffett*, 67 Tex. 642, 4 S. W. 70; *Furrah v. Winston*, 66 Tex. 521, 1 S. W. 527.

by such a will.⁶⁶ But a nuncupative will of land is admissible to show the intent of the deceased, and as corroborative of an assertion that deceased had previously made a parol gift or sale of the land.⁶⁷

A nuncupative will is valid as to personalty, although testator intended to pass realty also.⁶⁸

Value of Property Bequeathed

The statute of frauds by its terms⁶⁹ did not prohibit a nuncupative will where the estate thereby bequeathed did not exceed the value of £30. In many jurisdictions the statutes permit only a limited amount of personalty to be disposed of by a nuncupative will.⁷⁰

NUNCUPATIVE WILLS IN LOUISIANA

16. A nuncupative will, under the Code of this state, is one executed by a public act, before a notary, and dictated to him in the presence of three witnesses who reside in the place where the will is executed, or of five non-residents; or by private act, where the will is written in the presence of five witnesses residing in the place where the will is made, or of seven residing elsewhere; or where the testator presents to the same number of witnesses his will, not written in their presence, declaring it to be his last will.⁷¹

The Code requires that a testament by public nuncupative act shall be received by the notary, dictated by the testator, written down by the notary, read to the testator, all in the presence of the witnesses, and that express mention shall be made in the will itself that all these requirements have been complied with. Hence a will of this character which fails to recite that it was dictated and written down in the presence of the witnesses is invalid.⁷² The omis-

⁶⁶ Page v. Page, 2 Rob. (Va.) 424; In re Davis' Will, 103 Wis. 455, 79 N. W. 761.

⁶⁷ Wooldridge v. Hancock, 70 Tex. 18, 6 S. W. 818.

⁶⁸ Mulligan v. Leonard, 46 Iowa, 692.

⁶⁹ See ante, p. 45.

⁷⁰ See Mulligan v. Leonard, 46 Iowa, 692, holding will valid to extent of statutory limit, although personalty bequeathed in excess of amount permitted by statute.

⁷¹ Civ. Code, arts. 1574, 1578, 1581; 1 Underhill, Wills, § 179; Page, Wills, §§ 241, 242. See Weick v. Henne, 41 La. Ann. 1153, 5 South. 528.

⁷² Succession of Vidal, 44 La. Ann. 41, 10 South. 414. So with a will failing to state that the notary wrote it. Miller v. Shumaker, 42 La. Ann. 398, 7 South. 456. For proper certificate, see Monroe v. Liebman, 47 La. Ann. 155, 16 South. 734.

sion of any formality cannot be supplied by evidence dehors the testament.⁷³

The dictation must be by words pronounced orally, so that, where the testator hands to the notary written memoranda, expressing his wishes, saying "like this," and nothing more, the testament is null.⁷⁴

The witnesses to a will, whether by public or private act, must understand the language in which the testator expresses himself, and in which the will is drawn up; otherwise it is invalid.⁷⁵ And the fact that, while the will was being dictated, what was said was translated to a witness who did not understand the language, does not render the witness competent.⁷⁶

The testament should set forth the names, number, and residence of the witnesses, but it need not expressly negative the incapacities of such witnesses as enumerated by the Code.⁷⁷

A nuncupative testament by public act must show that all the formalities were complied with, "without interruption, and without turning aside to other acts."⁷⁸ But the notary need not declare in the will that the formalities were done at one time and without interruption. The party attacking the will must show the interruption.⁷⁹ Neither need the notary employ the precise language of the testator. All that is necessary is to express exactly his intent.⁸⁰ And he may question the testator as to his meaning,⁸¹ and suggest appropriate language in which to express it.⁸² The placing by a

⁷³ *Welck v. Henne*, 41 La. Ann. 1153, 5 South. 528.

In a will by public act, the act must state that the witnesses are residents of the place where the will was executed. A recital that they are competent is not enough. *Succession of Vollmer*, 40 La. Ann. 593, 4 South. 254.

⁷⁴ *Succession of Theriot*, 114 La. 611, 38 South. 471.

⁷⁵ *Richard v. Richard*, 129 La. 967, 57 South. 286.

⁷⁶ *Succession of D'Auterive*, 39 La. Ann. 1092, 3 South. 341.

⁷⁷ *Succession of Del Escobal*, 42 La. Ann. 1086, 8 South. 268, 9 L. R. A. 129; *In re Marqueze*, 50 La. Ann. 66, 23 South. 106; *Succession of Murray*, 41 La. Ann. 1109, 7 South. 126.

A description of the witnesses to a will as "all of this city," following, "C. R. a notary public for the city of New Orleans," sufficiently states their residence. *In re Marqueze*, *supra*.

A boy over 16 years of age, who resides in the parish, is a competent witness to a will by public act, although his parents live elsewhere. *Oglesby v. Turner*, 127 La. 1093, 54 South. 400.

⁷⁸ Civ. Code, art. 1578.

⁷⁹ *Succession of Saux*, 46 La. Ann. 1423, 16 South. 364; *Succession of Murray*, 41 La. Ann. 1109, 7 South. 126.

⁸⁰ *Succession of Saux*, 46 La. Ann. 1423, 16 South. 364; *Succession of Cauvien*, 46 La. Ann. 1412, 16 South. 309.

⁸¹ *Succession of Saux*, 46 La. Ann. 1423, 16 South. 364.

⁸² *Hennessey's Heirs v. Woulfe*, 49 La. Ann. 1376, 22 South. 394.

notary of an omitted word in the margin is immaterial, when the word can be ignored and the will is intelligible without it.⁸³ If able, the testator must sign the will;⁸⁴ if not, the notary certifies the fact, in which case nothing by way of mark or other signature is required of the testator.⁸⁵

A nuncupative testament, void as a public act, may be valid as a private act, if it has the requisites.⁸⁶

Mystic Will

A mystic testament, as recognized by the Code,⁸⁷ is one signed by the testator himself, sealed and given to a notary in the presence of three witnesses, accompanied by the testator's declaration that it is his last will. The envelope containing the document must then be indorsed by the notary, with a declaration of all the facts, which must be signed by him and the witnesses.

HOLOGRAPHIC WILLS

17. A holographic will is one entirely written by testator. The statutes of a minority of jurisdictions recognize such wills as valid, without formal execution or attestation, if wholly written, dated, and signed by the testator's own hand.

Wills of this character were recognized by the civil law, whence they were incorporated into the Code of Louisiana, whose legislation in this respect has been followed in some states. The general tendency, however, is not to discriminate between holographic and other wills.⁸⁸ Substantially literal compliance with the statute is essential to the validity of a holographic will. Where the requirements are those indicated in the black-letter text, a date partially written and partially printed invalidates the will.⁸⁹ But a date

⁸³ Dupuy v. Esnard, 51 La. Ann. 797, 25 South. 534.

⁸⁴ Civ. Code, art. 1582; Frith v. Pearce, 105 La. 186, 29 South. 809.

⁸⁵ Hennessey's Heirs v. Woulfe, 49 La. Ann. 1376, 22 South. 394. See Civ. Code La. arts. 1579, 1582.

⁸⁶ Ducasse's Heirs v. Ducasse, 120 La. 731, 45 South. 565; Succession of Reems, 115 La. 102, 38 South. 930.

⁸⁷ Civ. Code La. arts. 1584, 1587.

⁸⁸ In re Turell's Will, 166 N. Y. 330, 59 N. E. 910; Id., 47 App. Div. 560, 62 N. Y. Supp. 1053; In re Akers' Will, 74 App. Div. 461, 77 N. Y. Supp. 643.

⁸⁹ IN RE BILLINGS' ESTATE, 64 Cal. 427, 1 Pac. 701, Dunmore Cas. Wills, 29. Here, in the date, "April 1st, 1880," the figures "1880" were in print, the will being written on a letter head.

Accord: Succession of Robertson, 49 La. Ann. 868, 21 South. 586, 62 Am. St. Rep. 672. See, also, Rand's Estate, 61 Cal. 468, 44 Am. Rep. 555; Will-

omitting the first two figures of the year, as '97, is sufficient,⁹⁰ and it is immaterial in what part of the instrument the date appears.⁹¹ So the amount of a legacy may be expressed in figures.⁹² And generally if the name of the testator appears anywhere in the instrument, it is a sufficient signature,⁹³ though the rule is otherwise in Louisiana.⁹⁴ The will need not state the place of execution.⁹⁵

Statutes sometimes require that a holographic will shall be found among the valuable papers or effects of the deceased, or be lodged in the hands of some person for safe-keeping. This requirement is met when the will is found in a trunk containing papers belonging to the deceased and left with a friend for safe-keeping,⁹⁶ and by a letter expressing a wish that, in event of his death, certain land should go to the person to whom it was addressed, although the latter was not directed in the letter to preserve it as the testator's will.⁹⁷ But a holographic will of a decedent found in a box in which he kept stamps and stationery for sale as a postmaster was not among his valuable papers.⁹⁸

As with other wills, the particular form which the writing may

Wiams' Heirs v. Hardy, 15 La. Ann. 286; *Gaines v. Lizardi*, 3 Woods, 77, Fed. Cas. No. 5,175.

An instrument reading, "dated the _____ day of _____, 1906," is invalid because not dated as required by statute. *In re Price's Estate*, 14 Cal. App. 462, 112 Pac. 482.

⁹⁰ *In re Lakemeyer's Estate*, 135 Cal. 28, 66 Pac. 961, 87 Am. St. Rep. 96. Compare: *Succession of Swanson*, 132 La. 606, 61 South. 685.

Dating by using figures, to wit, "4—14—07," is sufficient. *In re Chevallier's Estate*, 159 Cal. 161, 113 Pac. 130.

⁹¹ *Zerega v. Percival*, 46 La. Ann. 590, 15 South. 476.

Although will must be dated, a mistake in the date will not invalidate it. *In re Noyes' Estate*, 40 Mont. 190, 105 Pac. 1017, 26 L. R. A. (N. S.) 1145, 20 Ann. Cas. 366.

⁹² *Succession of Vanhille*, 49 La. Ann. 107, 21 South. 191, 62 Am. St. Rep. 642.

⁹³ *In re Camp's Estate*, 134 Cal. 233, 66 Pac. 227; *In re Stratton's Estate*, 112 Cal. 513, 44 Pac. 1028; *Lawson v. Dawson's Estate*, 21 Tex. Civ. App. 361, 53 S. W. 64; *Dinning v. Dinning*, 102 Va. 467, 46 S. E. 473.

⁹⁴ *Succession of Armant*, 43 La. Ann. 310; 9 South. 50, 26 Am. St. Rep. 183; 7 Am. Prob. Rep. 361. See, also, *Roy v. Roy's Ex'r*, 16 Grat. (Va.) 418, 84 Am. Dec. 696; *Warwick v. Warwick*, 88 Va. 596, 10 S. E. 843, 6 L. R. A. 775.

⁹⁵ *Stead v. Curtis*, 191 Fed. 529, 112 C. C. A. 463.

⁹⁶ *Hill v. Bell*, 61 N. C. 122, 93 Am. Dec. 583; *Little v. Lockman*, 49 N. C. 494.

A holographic will locked in decedent's safe was "among his valuable papers," regardless of whether there was any other paper in that particular drawer of safe. *Harper v. Harper*, 148 N. C. 453, 62 S. E. 553.

⁹⁷ *Alston v. Davis*, 118 N. C. 202, 24 S. E. 15.

⁹⁸ *Brogan v. Barnard*, 115 Tenn. 260, 90 S. W. 858, 112 Am. St. Rep. 822, 5 Ann. Cas. 634.

take is immaterial.⁹⁹ Any clear expression of testamentary intent is enough. Thus a letter to a sister, in which, after referring to land and his intention to build thereon, the testator said, "If I die or get killed in Texas, the place must belong to you, and I would not want you to sell it," was held a good holographic will.¹

An instrument in the handwriting of the testator, though accompanied with an attestation clause, or though actually attested, is not therefore void as a holograph; the presumption being, until rebutted, that the witnesses were for the purpose of proving the handwriting, and not to prove an execution of the will in the statutory mode.²

The proof of the testator's handwriting is made in the usual manner in which such proof is effected whenever handwriting is in issue,³ and, if the will is assailed as a forgery, the fact must be established with some certainty.⁴

CONDITIONAL WILLS

18. A will may be conditional in form; i. e., its operation as a will may depend upon the fulfillment or happening of a condition precedent. The condition here referred to is one affecting the operation of the will as a whole, and not one conditioning a particular portion of a will otherwise unconditioned.

Cases involving this question have most commonly arisen in the construction of wills referring to some impending danger, and the possible death of the testator under certain circumstances. The question always is whether the happening of the possibility referred to is a condition precedent to the operation of the will, or whether the possibility of the happening was the motive which led to the preparation of the instrument, and which has been carelessly or inaccurately referred to in language in itself suggestive of a condition.

⁹⁹ A memorandum written by decedent on the front page of a book, dated eight years before his death and signed by him, reading, "Everything is Lou's," does not sufficiently show an intent to make a testamentary disposition. *Smith v. Smith*, 112 Va. 205, 70 S. E. 491, 33 L. R. A. (N. S.) 1018.

¹ *Alston v. Davis*, *supra*. See, also, *Webster v. Lowe*, 107 Ky. 293, 53 S. W. 1030.

² *In re Soher*, 78 Cal. 477, 21 Pac. 8; *Brown v. Beaver*, 48 N. C. 516, 67 Am. Dec. 255; *Ainsworth v. Briggs*, 49 Tex. Civ. App. 344, 108 S. W. 753; *Perkins v. Jones*, 84 Va. 358, 4 S. E. 833, 10 Am. St. Rep. 863; 1 *Underhill, Wills*, § 9.

³ *Mitchell v. Donohue*, 100 Cal. 202, 34 Pac. 614, 38 Am. St. Rep. 279; *Franklin v. Franklin*, 90 Tenn. 44, 16 S. W. 557.

⁴ *Barlaw v. Harrison*, 51 La. Ann. 875, 25 South. 378.

While the cases are irreconcilable, the strong tendency of the courts is to construe wills as unconditional if there is any room for doubt. If by reasonable interpretation the language can be regarded as meaning that the testator referred to the contingent event as the reason merely for making the will, the will is not conditional.⁵

Wills Held Conditional

The following wills were construed as conditional: "I, being on the eve of embarking for San Francisco, South America, or Mexico, do hereby, in case of my decease during my absence being fully ascertained and proved, will over," etc.⁶

An illiterate farmer, having occasion to go to town, executed the following paper: "I am going to town and I ain't feeling good, and in case if i shouldend get back do as i say on this paper." Then followed a disposition of his property. He returned home, where he died a few days later. Held, that failure to return home was a condition precedent to the operation of the instrument.⁷ The words, "as I intend starting in a few days for the state of Missouri, and should anything happen that I should not return alive," were also construed as a condition.⁸

Wills Held Unconditional

A will read thus: "'Thursday morning. In case of any fatal accident happening to me, being about to travel by railway, I hereby leave all my property," etc. The testator did not die upon the journey. Held, that its validity did not depend upon that event, and that it was entitled to probate.⁹

"In the name of God, amen: I, J. W. D., being about to go to Cuba, and knowing the dangers of voyages, do hereby make this

⁵ *Damon v. Damon*, 8 Allen (Mass.) 192; *Brown v. Concord*, 33 N. H. 285; *Cody v. Conly*, 27 Grat. (Va.) 313; *Skipwith v. Cabell's Ex'r*, 19 Grat. (Va.) 758; *Eaton v. Brown*, 193 U. S. 411, 24 Sup. Ct. 487, 48 L. Ed. 730; *In re Porter*, L. R. 2 P. & D. 22, 24; *Goods of Dobson*, L. R. 1 P. & D. 88; 1 Redf. Wills, 176.

⁶ *Goods of Winn*, 2 Sw. & Tr. 147. Testator went to San Francisco, returned to England, afterwards went to Australia, where he died.

⁷ *Appeal of Morrow*, 116 Pa. 440, 9 Atl. 660, 2 Am. St. Rep. 616.

⁸ *Dougherty v. Dougherty*, 4 Metc. (Ky.) 25. For further instances of conditional wills, see *In re Jeffries' Estate*, 24 Pa. Co. Ct. R. 492, 9 Pa. Dist. R. 709; *Robnett v. Ashlock*, 49 Mo. 171; *Maxwell v. Maxwell*, 3 Metc. (Ky.) 101; *Goods of Porter*, L. R. 2 P. & D. 22; *Parsons v. Lauve*, 1 Ves. Sr. 189; *Lindsay v. Lindsay*, L. R. 2 P. & D. 459; *Davis v. Davis* (1914) 107 Miss. 245, 65 South. 241; *Magee v. McNeill*, 41 Miss. 17, 90 Am. Dec. 354; *Wagner v. McDonald*, 2 Har. & J. (Md.) 346; *Roberts v. Roberts*, 2 Sw. & Tr. 337.

⁹ *Goods of Dobson*, L. R. 1 P. & D. 88.

my last will and testament. First, if by casualty or otherwise I should lose my life during this voyage, I give and bequeath to my wife," etc. Testator returned from Cuba and died several years afterwards. This will was admitted to probate, though the bequest to the wife was held conditional.¹⁰ So a will reading, "If I get drowned this morning, March 7, 1872, I bequeath," etc., was held not conditional upon the testator's death by drowning at the time referred to, but a statement of the motive leading to the making of the will.¹¹

Extrinsic Evidence to Determine Conditional Character

The question as to whether a will is conditional is one of construction, to be decided by the court.¹² The court is to put itself as nearly as may be in the position of the testator, and then determine his intent, looking at the will, as well as possible, from his standpoint. All the surrounding circumstances attending the execution may be shown,¹³ as may also the preservation of the document after the apparent condition has failed, and instructions to the beneficiary to take care of it.¹⁴ Such evidence, however, is of comparatively little weight, for the conditional character of the will depends upon the testator's intent at the time of execution; and evidence of this sort would tend to show a subsequent intent that the will should operate regardless of the condition, rather than an original intent that the will should be unconditional. A subsequent desire that a will once conditional should become absolute, is, of course, ineffective without a re-execution or republication of the will.¹⁵

Parol evidence is not admissible to show that a will absolute on its face was intended to be conditional.¹⁶

¹⁰ *Damon v. Damon*, 8 Allen (Mass.) 192.

¹¹ *French v. French*, 14 W. Va. 458. For further cases illustrative of unconditional wills, see *In re Redhead's Estate*, 83 Miss. 141, 35 South. 761; *In re Forquer's Estate*, 216 Pa. 331, 66 Atl. 92, 8 Ann. Cas. 1146; *Goods of Martin*, L. R. 1 P. & D. 380; *In re Mayd*, 6 P. D. 17; *Tarver v. Tarver*, 9 Pet. 174, 9 L. Ed. 91; *Burton v. Callingwood*, 4 Hagg. 176; *Forbes v. Gordon*, 3 Phill. 625; *Likefield v. Likefield*, 82 Ky. 589, 56 Am. Rep. 908; *Thorne's Case*, 4 Sw. & Tr. 36; *EATON v. BROWN*, 193 U. S. 411, 24 Sup. Ct. 487, 48 L. Ed. 730, *Dunmore Cas. Wills*, 30.

¹² *Magee v. McNeill*, 41 Miss. 17, 90 Am. Dec. 354.

¹³ *French v. French*, 14 W. Va. 460.

¹⁴ *Likefield v. Likefield*, 82 Ky. 589, 56 Am. Rep. 908.

¹⁵ A republication of a contingent will, when the contingency has not occurred, relieves the will of the contingency expressed. *In re Forquer's Estate*, 216 Pa. 331, 66 Atl. 92, 8 Ann. Cas. 1146.

¹⁶ *Sewell v. Slingluff*, 57 Md. 537.

Will Absolute, but a Part Thereof Conditional

The distinction is readily observed between a will operative only upon a contingency, and a will absolute, but containing a conditional legacy or bequest. The failure of the latter has, of course, no effect upon the rest of the will.¹⁷

¹⁷ *Damon v. Damon*, 8 Allen (Mass.) 192; *Massie v. Griffin*, 2 Metc. (Ky.) 364; *Halford v. Halford* (1897) 66 L. J. P. D. & A. (N. S.) 29.

CHAPTER IV

AGREEMENTS TO MAKE WILLS, AND WILLS RESULTING FROM AGREEMENT

19. The Contract to Make a Will.
20. The Remedy.
21. Joint, Mutual, or Reciprocal Wills.

THE CONTRACT TO MAKE A WILL

19. A contract to make a will in favor of another is valid, and is governed by the ordinary principles of the law of contracts.

Though occasionally criticized,¹ the doctrine that contracts of this character are valid is thoroughly established.² All the essential elements of a contract must be present. A writing, or an oral promise relating to the making of a will which discloses no consideration, and under which no obligation is assumed by either party, does not constitute a contract, and may be revoked by the maker.³

¹ *Duvale v. Duvale*, 54 N. J. Eq. 581, 35 Atl. 750.

² *BOLMAN v. OVERALL*, 80 Ala. 451, 2 South. 624, 60 Am. Rep. 107, *Dunmore Cas. Wills*, 38; *Owens v. McNally*, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369; *Banks v. Howard*, 117 Ga. 94, 43 S. E. 438; *Whiton v. Whiton*, 179 Ill. 32, 53 N. E. 722, affirming 79 Ill. App. 99; *Caviness v. Rushton*, 101 Ind. 500, 51 Am. Rep. 759; *Purviance v. Purviance*, 14 Ind. App. 269, 42 N. E. 364; *Woods v. Matlock*, 19 Ind. App. 364, 48 N. E. 384; *Bird v. Jacobus*, 113 Iowa, 194, 84 N. W. 1062; *Allbright v. Hannah*, 103 Iowa, 98, 72 N. W. 421; *Howe v. Watson*, 179 Mass. 30, 60 N. E. 415; *Wright v. Wright*, 99 Mich. 170, 58 N. W. 54, 23 L. R. A. 196; *Newton v. Newton*, 46 Minn. 33, 48 N. W. 450; *Kleeberg v. Schrader*, 69 Minn. 136, 72 N. W. 59; *Nowack v. Berger*, 133 Mo. 24, 34 S. W. 489, 31 L. R. A. 810, 54 Am. St. Rep. 663; *Duvale v. Duvale*, 54 N. J. Eq. 581, 35 Atl. 750; *Edson v. Parsons*, 155 N. Y. 555, 50 N. E. 265; *Kine v. Farrell*, 71 App. Div. 219, 75 N. Y. Supp. 542; *Goldstein v. Goldstein*, 35 Misc. Rep. 251, 71 N. Y. Supp. 807; *Bouton v. Welch*, 48 App. Div. 378, 63 N. Y. Supp. 80; *Judd v. Burrell*, 67 Hun, 650, 22 N. Y. Supp. 212; *Heath v. Heath*, 18 Misc. Rep. 521, 42 N. Y. Supp. 1087; *Lipe v. Houck*, 128 N. C. 115, 38 S. E. 297; *Phipps v. Hope*, 16 Ohio St. 586; *In re Harper's Estate*, 7 Pa. Dist. R. 532; *In re Hoffner's Estate*, 161 Pa. 331, 29 Atl. 33; *Townsend v. Vanderwerker*, 160 U. S. 171, 16 Sup. Ct. 258, 40 L. Ed. 383; *Walpole v. Oxford*, 3 Ves. Jr. 402.

³ *Drake v. Lanning*, 49 N. J. Eq. 452, 24 Atl. 378; *Spraker v. Dow*, 48 Hun, 619, 1 N. Y. Supp. 240; *Richardson v. Orth*, 40 Or. 252, 66 Pac. 925, 69 Pac. 455; *In re Wright's Estate*, 155 Pa. 64, 25 Atl. 877; *In re Pleasanton's Estate*, 19 Pa. Co. Ct. R. 205; *Id.*, 6 Pa. Dist. R. 5; *In re King's Estate*, 150 Pa. 143, 24 Atl. 661; *Saure v. McClanahan* (Tenn. Ch. App.) 57 S. W. 359; *Mitchell v.*

A contract to make a will does not ordinarily affect the revocability of a will made in accordance therewith.⁴ The power of the testator over the instrument remains unimpaired. A right of action only exists against his estate if the will called for by the contract is not left in force at his decease.⁵

Consideration

The considerations most common in contracts of this character are either the care and support of the testator by the person in whose favor the promise is made,⁶ or the surrender of a child for adoption in return for a promise by the party adopting the child to make a will in the latter's favor;⁷ but any other consideration is sufficient, such as services of any kind,⁸ the conveyance of property,⁹ an agreement to pay an annuity,¹⁰ mutual promises by two persons to make wills of certain property each in favor of the other,¹¹ the abandonment by a wife of proceedings for divorce and the resumption of conjugal relations in consideration of the husband's promise to provide for her by will,¹² improvements upon property conveyed by a husband to a wife, made by the former in consideration of the latter's promise to make a will in his favor,¹³ the erection of a house by one party upon land of another in consideration of the latter's promise that the former should have it when the latter was done with it,¹⁴ the extension of time for payment

Pirle, 38 Wash. 691, 80 Pac. 774; *In re Fickus*, 69 Law J. Ch. 161, 81 Law T. (N. S.) 749, 48 Wkly. Rep. 250.

⁴ See post, p. 70.

⁵ *Sloniger v. Sloniger*, 161 Ill. 270, 43 N. E. 1111.

⁶ *Fuchs v. Fuchs*, 48 Mo. App. 18; *Brady v. Smith*, 8 Misc. Rep. 465, 28 N. Y. Supp. 776; *Hart v. Hart*, 57 N. J. Eq. 543, 42 Atl. 153; *Eggers v. Anderson*, 63 N. J. Eq. 264, 49 Atl. 578, 55 L. R. A. 570; *Burdine v. Burdine's Ex'r*, 98 Va. 515, 36 S. E. 992, 81 Am. St. Rep. 741.

⁷ *Benge v. Hiatt's Adm'r*, 82 Ky. 666, 56 Am. Rep. 912; *Healey v. Simpson*, 113 Mo. 340, 20 S. W. 881; *Burns v. Smith*, 21 Mont. 251, 53 Pac. 742, 69 Am. St. Rep. 653; *Winne v. Winne*, 166 N. Y. 263, 59 N. E. 832, 82 Am. St. Rep. 647; *Heath v. Heath*, 18 Misc. Rep. 521, 42 N. Y. Supp. 1087; *In re Harper's Estate*, 7 Pa. Dist. R. 532. See, however, contra, *Woods v. Evans*, 113 Ill. 186, 55 Am. Rep. 409; *Wallace v. Rappleye*, 103 Ill. 229.

⁸ *Lipe v. Houck*, 128 N. C. 115, 38 S. E. 297; *Emery v. Darling*, 50 Ohio St. 160, 33 N. E. 715; *Thompson v. Stevens*, 71 Pa. 161.

⁹ *Bird v. Jacobus*, 113 Iowa, 194, 84 N. W. 1062.

¹⁰ *Garard v. Yeager*, 154 Ind. 253, 56 N. E. 237.

¹¹ *Crofut v. Layton*, 68 Conn. 91, 35 Atl. 783; *Brown v. Webster*, 90 Neb. 591, 134 N. W. 185, 37 L. R. A. (N. S.) 1196. See post, p. 75.

¹² *Goldstein v. Goldstein*, 35 Misc. Rep. 251, 71 N. Y. Supp. 807.

¹³ *Duvale v. Duvale*, 54 N. J. Eq. 581, 35 Atl. 750.

¹⁴ *Allbright v. Hannah*, 103 Iowa, 98, 72 N. W. 421.

of past services,¹⁵ or the forbearance of a suit.¹⁶ If the consideration exists, its inadequacy will not affect the validity of the contract. Thus where deceased promised her sister, who resided in a distant state, that, if she would come and live with her during the remainder of her life, she (the deceased) would leave her all her property, and the sister, in reliance upon the promise, broke up her home and came to reside with the deceased, who died thirty-eight hours after her arrival, the contract was valid and enforceable.¹⁷

Where a promise to make a will in favor of one party is made in consideration of the latter's promise to do an act, the contract is mutually binding, and an action is maintainable against the latter for its breach, either by the promisee, or by a third party for whose benefit the contract is made,¹⁸ in jurisdictions where a contract made for the benefit of a third party is enforceable by him.

Certainty of Contract

Indefiniteness in terms is as fatal to the validity of contracts of this character as to that of all other contracts. The contract must disclose precisely what property the testator contracted to dispose of by will,¹⁹ and what the beneficiary undertook to do in return therefor. Where services are to be rendered, the evidence must be definite as to the time when the contract was made, and the character and duration of the services.²⁰ So a promise to an employé to leave him as much by will as he would lose by declining an offer of partnership and remaining in the service of the promisor is too indefinite as to amount to be actionable,²¹ as is also a promise by a grandfather to a grandson that, if he would attend to the business, "I will leave it to you as I promised you," where there was no evidence as to what the prior promise of the testa-

¹⁵ *Murtha v. Donohoo*, 149 Wis. 481, 134 N. W. 406, 136 N. W. 158, 41 L. R. A. (N. S.) 246.

¹⁶ *Purviance v. Purviance*, 14 Ind. App. 269, 42 N. E. 364.

¹⁷ *Howe v. Watson*, 179 Mass. 30, 60 N. E. 415.

¹⁸ *Lawrence v. Oglesby*, 178 Ill. 122, 52 N. E. 945; *Winn v. Schenck*, 33 Ky. Law Rep. 615, 110 S. W. 827; *Yearance v. Powell*, 55 N. J. Eq. 577, 37 Atl. 735; *In re Hoffner's Estate*, 161 Pa. 331, 29 Atl. 33.

¹⁹ A promise, upon consideration, to devise "something" to plaintiff, is too indefinite. *Freeman v. Morris*, 131 Wis. 216, 109 N. W. 983, 120 Am. St. Rep. 1038, 11 Ann. Cas. 481. And an agreement, upon adopting two children, to treat them as his own, is not a contract to will property. *Baumann v. Kusian*, 164 Cal. 582, 129 Pac. 936, 44 L. R. A. (N. S.) 756.

²⁰ *In re Cook's Estate*, 12 Pa. Co. Ct. R. 621, 32 Wkly. Notes Cas. 231; *In re Eldred's Estate*, 9 Pa. Dist. R. 420.

²¹ *Russell v. Agar*, 121 Cal. 396, 53 Pac. 926, 66 Am. St. Rep. 35.

tor was.²² And a promise of a good home during the testator's life, with a provision against want at his death, is objectionable for indefiniteness.²³

But a contract to bequeath one-half²⁴ or the whole of one's estate²⁵ is sufficiently definite as to the subject-matter, as is also an agreement by an annuitant to devise all of her annuity not used for her support during her lifetime,²⁶ or an agreement to leave the promisee enough so that she need not work.²⁷ In such cases the maxim, "Id certum est quod certum reddi potest," applies. So an agreement to return and live with the testator and his wife sufficiently describes the services to be rendered,²⁸ and the name "Sister Ellen" is an adequate description of the party in whose favor the will is to be made.²⁹

An agreement need not be in express terms to make a will, and a promise that the promisee shall receive the property, or that it shall be left to him at promisor's death, is sufficient.³⁰

Evidence to Establish the Contract

A contract to make a will is not favored,³¹ and the party relying upon a contract to make a will must prove it by clear and convincing evidence.³² An expectation of a will in his favor by the one party, and the contemplation of the making of such a will on

²² In re Purves' Estate, 9 Pa. Dist. R. 5.

²³ Wall's Appeal, 111 Pa. 460, 5 Atl. 220, 56 Am. Rep. 288. See, also, Graham v. Graham's Ex'rs, 34 Pa. 475.

²⁴ Roehl v. Haumesser, 114 Ind. 311, 15 N. E. 345.

²⁵ Howe v. Watson, 179 Mass. 30, 60 N. E. 415; Leahy v. Campbell, 70 App. Div. 127, 75 N. Y. Supp. 72; Healey v. Simpson, 113 Mo. 340, 20 S. W. 881; Drake v. Lanning, 49 N. J. Eq. 452, 24 Atl. 378.

²⁶ Garard v. Yeager, 154 Ind. 253, 56 N. E. 237.

²⁷ Thompson v. Tucker-Osborn, 111 Mich. 470, 69 N. W. 730. Or to leave her "independently rich." In re Cottrell's Estate, 2 Wkly. Notes Cas. (Pa.) 83.

²⁸ Burdine v. Burdine's Ex'r, 98 Va. 515, 36 S. E. 992, 81 Am. St. Rep. 741, 2 Va. Sup. Ct. Rep. 438.

²⁹ Howe v. Watson, 179 Mass. 30, 60 N. E. 415.

³⁰ Keefe v. Keefe, 19 Cal. App. 310, 125 Pac. 929; Teske v. Dittberner, 70 Neb. 544, 98 N. W. 57, 113 Am. St. Rep. 802.

³¹ Davidson v. Davidson, 72 W. Va. 747, 79 S. E. 998.

³² Stiles v. Beed, 151 Iowa, 86, 130 N. W. 376; Eastwood v. Crane, 125 Iowa, 707, 101 N. W. 481; In re Peterson, 76 Neb. 652, 107 N. W. 993, 111 N. W. 361; Taylor v. Higgs, 202 N. Y. 65, 95 N. E. 30; Bucher v. Eaton, 151 App. Div. 342, 135 N. Y. Supp. 838; Russell v. Jones, 68 O. C. A. 487, 135 Fed. 929.

It is sometimes required that the proof be so clear and convincing as to leave no reasonable doubt as to the making of the contract and its terms. Grantham v. Gossett, 182 Mo. 651, 81 S. W. 895; Goodin v. Goodin, 172 Mo. 40, 72 S. W. 502.

the part of the other, are not enough.³³ The testimony of two witnesses that the testatrix promised to remember the plaintiff in her will, and to provide for her when she died, in consideration of certain household services, has been held insufficient to establish a contract to make a will in favor of the plaintiff.³⁴ So in an action on an oral agreement to bequeath to the plaintiff all of the testator's property, although three witnesses testified to the terms of the contract, yet it was not regarded as sufficiently established, in view of the facts that testator was unacquainted with the plaintiff when she became a member of his family, that he was living happily with his wife, and that there was a subsequent written undertaking to give the plaintiff only a daughter's share in his property.³⁵ But proof of an agreement to devise was sufficiently made out by showing that the decedent's two sons took the management of her farm, made improvements, cultivated it, paid part of the mortgage debt and assumed the rest, and that decedent had remarked in the presence of others that she had agreed to devise the farm to her sons in consideration of their so doing.³⁶

Where plaintiff alleges a contract to devise to him in consideration of his living with promisor and performing services, evidence that wages were paid him during this time by decedent is admissible to disprove plaintiff's allegation.³⁷

If an oral agreement to make a will has been only partially embodied in a writing, oral evidence may be received to prove stipulations other than those contained in the writing.³⁸

Since the promisee is usually disqualified as a witness by statute, the evidence to establish contract to make a will must be found in writings or in the testimony of disinterested witnesses.³⁹

³³ *Gross v. Newman's Adm'r* (Ky.) 50 S. W. 530; *In re Cavanaugh's Estate*, 17 Pa. Co. Ct. R. 305; *Brown v. Garten*, 89 Iowa, 373, 56 N. W. 536; *Cessna v. Miller*, 85 Iowa, 725, 51 N. W. 50; *Wilmer v. Borer*, 4 Kan. App. 109, 46 Pac. 181; *In re Stewart's Estate*, 21 Misc. Rep. 412, 47 N. Y. Supp. 1065; *Teats v. Flanders*, 118 Mo. 666, 24 S. W. 126.

An expression of intention to devise property, although definite and unequivocal, does not amount to a contract to do so. *Caldwell v. Turner*, 129 La. 19, 55 South. 695; *Stillwell v. Bateman*, 83 Misc. Rep. 589, 145 N. Y. Supp. 321.

³⁴ *Newton's Ex'r v. Field*, 98 Ky. 186, 32 S. W. 623.

³⁵ *Wilson v. Heath*, 23 Misc. Rep. 714, 53 N. Y. Supp. 166.

³⁶ *In re Sherman*, 24 Misc. Rep. 65, 53 N. Y. Supp. 376.

³⁷ *Waters v. Cline*, 121 Ky. 611, 85 S. W. 209, 750, 123 Am. St. Rep. 215.

³⁸ *Bird v. Pope*, 73 Mich. 483, 41 N. W. 514.

³⁹ *O'Brien v. Foley*, 150 App. Div. 257, 134 N. Y. Supp. 825; *Hanly v. Hanly*, 105 App. Div. 335, 93 N. Y. Supp. 864.

Application of the Statute of Frauds

An agreement to devise real property,⁴⁰ to allow land to descend by making no will,⁴¹ or to leave all one's property, both real and personal, by will, to the promisee,⁴² must be in writing, as being a contract for the transfer of an interest in land. And in the last-mentioned case the contract, if oral, is inoperative with reference to the personalty, it being indivisible from the real estate in respect to the alleged contract.⁴³

An oral agreement to leave a certain amount of money by will to a particular person is not within the statute of frauds, since it is not for the sale of goods and may be performed within the year,⁴⁴ but where the statute requires a contract for the sale of goods exceeding a certain amount to be in writing, it would seem necessary that the contract to bequeath personal property, exceeding the value fixed, be reduced to writing.⁴⁵

An action in quantum meruit will lie for services rendered under a contract inoperative by reason of the statute of frauds,⁴⁶ and resort may be had to such oral contract for the purpose of rebutting the presumption that the services rendered by a member of the family were gratuitous.⁴⁷

A part performance of the contract with reference to the land agreed to be devised, such as putting the promisee in possession before the promisor's death,⁴⁸ is sufficient to take the contract out of the operation of the statute.

⁴⁰ *Pond v. Sheean*, 132 Ill. 312, 23 N. E. 1018, 8 L. R. A. 414; *Demoss v. Robinson*, 46 Mich. 62, 8 N. W. 712, 41 Am. Rep. 144; *Fuchs v. Fuchs*, 48 Mo. App. 18; *Stevens v. Lee*, 70 Tex. 279, 8 S. W. 40; *Hale v. Hale*, 90 Va. 728, 19 S. E. 739.

⁴¹ *Dicken v. McKinley*, 163 Ill. 318, 45 N. E. 134, 54 Am. St. Rep. 471.

⁴² *GRANT v. GRANT*, 63 Conn. 530, 29 Atl. 15, 38 Am. St. Rep. 379, *Dunmore Cas. Wills*, 35; *Ellis v. Cary*, 74 Wis. 176, 42 N. W. 252, 4 L. R. A. 55, 17 Am. St. Rep. 125.

Although an oral contract to make a will may be valid where made, it will not be enforced in a jurisdiction where the statute requires an agreement to make a will to be in writing and where such statute embodies a distinctive policy of the forum, viz., the prevention of fraud and perjury. *Emery v. Burbank*, 163 Mass. 326, 39 N. E. 1026, 28 L. R. A. 57, 47 Am. St. Rep. 456.

⁴³ *Gould v. Mansfield*, 103 Mass. 408, 4 Am. Rep. 573; *Shahan v. Swan*, 48 Ohio St. 25, 26 N. E. 222, 29 Am. St. Rep. 517; *Ellis v. Cary*, 74 Wis. 176, 42 N. W. 252, 4 L. R. A. 55, 17 Am. St. Rep. 125.

⁴⁴ *Wellington v. Apthorp*, 145 Mass. 69, 13 N. E. 10.

⁴⁵ *Wallace v. Long*, 105 Ind. 522, 5 N. E. 666, 55 Am. Rep. 222. See, however, dictum in *Whiton v. Whiton*, 179 Ill. 32, 53 N. E. 722.

⁴⁶ *Stevens v. Lee*, 70 Tex. 279, 8 S. W. 40.

⁴⁷ *In re Williams' Estate*, 106 Mich. 490, 64 N. W. 490.

⁴⁸ *Dicken v. McKinley*, 163 Ill. 318, 45 N. E. 134, 54 Am. St. Rep. 471; *Mauck v. Melton*, 64 Ind. 414; *Allbright v. Hannah*, 103 Iowa, 98, 72 N. W.

The courts are divided on the question as to whether the surrender of a child for adoption is a sufficient part performance to remove the bar of the statute. It is believed that, on principle, however, such acts do not amount to part performance sufficient for this purpose.⁴⁹

Construction and Operation

Contracts of this character are construed as are all other contracts, and are given effect according to the plain import of their terms. In order to recover, promisee must show a performance of all conditions precedent,⁵⁰ so that a promisee who has agreed to remain with her father during his lifetime, in consideration of his bequeathing to her one-fourth of his property, is not entitled to recover where she leaves her father and marries.⁵¹ But a condonation of acts which would have entitled the promisor to discharge from his service the promisee, to whom he had contracted to devise property in consideration of such service, will enable her to maintain action for breach of agreement.⁵²

A contract between a testator and his daughter that he will refund to her certain money if she did not "heir" a particular portion of his land at his death means that he will convey to her his entire estate therein, either by deed or will, and is not met by a devise to her for life, with remainder over, in event of her death without issue.⁵³ So an agreement between father and son that each shall bequeath to the other his holdings in certain stock is not fulfilled by a conditional bequest.⁵⁴ And an agreement by one who owned a one-third interest in a business, to bequeath 25 per cent. of said business to promisee, meant that percentage of the

421; *Smith v. Pierce*, 65 Vt. 200, 25 Atl. 1092; *Brinton v. Van Cott*, 8 Utah, 480, 33 Pac. 218; *Brown v. Sutton*, 129 U. S. 238, 9 Sup. Ct. 273, 32 L. Ed. 664. See, also, *Carmichael v. Carmichael*, 72 Mich. 76, 40 N. W. 173, 1 L. R. A. 596, 16 Am. St. Rep. 528.

⁴⁹ See *Dicken v. McKinley*, 163 Ill. 318, 45 N. E. 134, 54 Am. St. Rep. 471; *Wallace v. Long*, 105 Ind. 522, 5 N. E. 666, 55 Am. Rep. 222; *Shahan v. Swan*, 48 Ohio St. 25, 26 N. E. 222, 29 Am. St. Rep. 517. Contra: *Sutton v. Hayden*, 62 Mo. 101; *Van Duyne v. Vreeland*, 12 N. J. Eq. 143.

⁵⁰ *Weingaertner v. Pabst*, 115 Ill. 412, 5 N. E. 385.

⁵¹ *Tussey v. Owen*, 139 N. C. 457, 52 S. E. 128. Accord: *Cox v. Cox*, 26 Grat. (Va.) 305.

⁵² *Burdine v. Burdine's Ex'r*, 98 Va. 515, 36 S. E. 992, 81 Am. St. Rep. 741, 2 Va. Sup. Ct. Rep. 438; *Burns v. Smith*, 21 Mont. 251, 53 Pac. 742, 69 Am. St. Rep. 653.

⁵³ *Parrott v. Graves' Ex'x* (Ky.) 32 S. W. 605.

A bequest of property in trust is not a compliance with a contract to bequeath it absolutely. *Earnhardt v. Clement*, 137 N. C. 91, 49 S. E. 49.

⁵⁴ *Croft v. Layton*, 68 Conn. 91, 35 Atl. 783.

entire business, and not merely of his interest.⁵⁵ A contract between husband and wife that each of them shall convey to the other, by deed or will, to take effect upon their demise, all their property, both real and personal, includes all the property which they owned jointly or separately.⁵⁶ And where the arrangement as contemplated by the parties is fulfilled by the mere making of the will, the testator is then at liberty to provide for a different disposition of his property.⁵⁷ A contract to give the promisee a child's share in the testator's estate is affected only in regard to the amount to be received by the subsequent birth of issue to the decedent.⁵⁸

When a will has been executed in compliance with a contract to that end, and the promisee is actually put in possession of the property which he is to take under the will, some courts treat the contract as executed, and regard the interest thus created in the promisee as indefeasible either by a subsequent deed or will of the promisor.⁵⁹ Where the contract, in addition to the agreement for a will, contains other provisions, possession in accordance with which creates a legal estate in the promisee, such a conclusion is sound, and justifies the decision, though not the language of the opinion, in *Tuit v. Smith*.⁶⁰ But where the contract is for a will, only, such a doctrine is without foundation in principle. No interest can ever pass under a will until the death of the testator, and unless it is operative at that time. A subsequent deed or a will must operate to pass the legal title, and the remedy of the original promisee is in equity, so far as the property itself is concerned.⁶¹ There seems no reason, however, why a party may not, for a sufficient consideration, agree not to make a will.⁶² Such an agreement properly may be construed as an agreement to stand seised of the property to the use of the promisee, or at least to hold it to his use, possession to commence at the death of the promisor.⁶³

⁵⁵ *Sarasohn v. Kamalky*, 193 N. Y. 203, 86 N. E. 20.

⁵⁶ *Svanburg v. Fosseen*, 75 Minn. 350, 78 N. W. 4, 43 L. R. A. 427, 74 Am. St. Rep. 490.

⁵⁷ *Noble v. Metcalf*, 157 Ala. 295, 47 South. 1007; *Eggers v. Anderson* (Err. & App.) 63 N. J. Eq. 264, 49 Atl. 578, 55 L. R. A. 570; *Stiles v. Beed*, 151 Iowa, 86, 130 N. W. 376.

⁵⁸ *Healy v. Healy*, 55 App. Div. 315, 66 N. Y. Supp. 927.

⁵⁹ *Tuit v. Smith*, 137 Pa. 35, 20 Atl. 579; *Bruce v. Moon*, 57 S. C. 60, 35 S. E. 415; *BOLMAN v. OVERALL*, 80 Ala. 451, 2 South. 624, 60 Am. Rep. 107, *Dunmore Cas. Wills*, 38.

⁶⁰ *Supra*, note 59. See, also, *Bird v. Pope*, 73 Mich. 483, 41 N. W. 514.

⁶¹ *Andrews v. Andrews*, 122 N. C. 352, 29 S. E. 351; *Kline v. Farrell*, 71 App. Div. 219, 75 N. Y. Supp. 542.

⁶² See *Dicken v. McKinley*, 163 Ill. 318, 45 N. E. 134, 54 Am. St. Rep. 471.

⁶³ *Taylor v. Mitchell*, 87 Pa. 518, 30 Am. Rep. 383.

THE REMEDY

20. In event of the breach of a contract to make a will, the promisee has a twofold remedy:

- (a) He may sue the personal representative of the deceased at law to recover damages for breach of contract; or
- (b) He may proceed in equity to compel the parties taking the legal title to the property in question in consequence of the failure of the decedent to make the will contracted for, to convey to him the property which he would have taken, had the will been made in compliance with the contract.

A valid contract to make a will cannot be set up to defeat the probate of a will making a disposition of property in violation of such contract.⁶⁴ But one to whom the deceased agreed to leave property by will may sue at law for breach of agreement.⁶⁵ No change in the validity of such a contract, or in the right to recover upon its breach, can be effected by a subsequent contract of the promisor, made when insane.⁶⁶ And where the will as made did not comply with the terms of the agreement, expressions of satisfaction with the will by the beneficiary do not constitute a waiver of her rights under the contract.⁶⁷

If money was advanced by promisee on the strength of the promise to make a will, action will lie for money had and received.⁶⁸ When the contract is inoperative by reason of the statute of frauds, this is the only remedy. But, if promisee has willfully failed to perform all services required on his part, he gener-

⁶⁴ *SUMNER v. CRANE*, 155 Mass. 483, 29 N. E. 1151, 15 L. R. A. 447, *Dunmore Cas. Wills*, 186; *ALLEN v. BROMBERG*, 147 Ala. 317, 41 South. 771, *Dunmore Cas. Wills*, 42.

⁶⁵ *Purviance v. Shultz*, 16 Ind. App. 94, 44 N. E. 766; *Price's Adm'x v. Price's Adm'x*, 111 Ky. 771, 64 S. W. 746, rehearing denied 66 S. W. 529; *Lisle v. Tribble*, 92 Ky. 304, 17 S. W. 742; *Wellington v. Apthorp*, 145 Mass. 69, 13 N. E. 10; *Howe v. Watson*, 179 Mass. 30, 60 N. E. 415; *Clark v. Cordry*, 69 Mo. App. 6; *Stone v. Todd*, 49 N. J. Law, 274, 8 Atl. 300; *Cullen v. Woolverton*, 65 N. J. Law, 279, 47 Atl. 626; *In re Wescott*, 34 App. Div. 239, 54 N. Y. Supp. 545; *Heath v. Heath*, 18 Misc. Rep. 521, 42 N. Y. Supp. 1087; *Hursey v. Surles*, 91 S. O. 284, 74 S. E. 618; *Rice v. Hartman*, 84 Va. 251, 4 S. E. 621.

⁶⁶ *Hudson v. Hudson*, 87 Ga. 678, 13 S. E. 583, 27 Am. St. Rep. 270.

⁶⁷ *Washburn v. Weeks*, 63 Hun, 627, 17 N. Y. Supp. 708.

⁶⁸ *Lisle v. Tribble*, 92 Ky. 304, 17 S. W. 742.

ally is not allowed to recover on an implied contract to pay for the benefit conferred by his partial performance.⁶⁹

The right of action does not accrue upon a contract to make provision for another by will until the death of the promisor, and the statute of limitations begins to run only from that time.⁷⁰ But when a servant agrees to serve as housekeeper during the lifetime of her master, in consideration of a legacy to be bequeathed by the latter, she may, when wrongfully discharged, maintain an action during the master's lifetime, for such discharge.⁷¹

Parties and Pleading

In an action at law for breach of contract to make a will, the party defendant is the personal representative of the decedent,⁷² and the heirs or legatees should not be joined.⁷³ An agreement to leave property to several persons by will, share and share alike, is several, and all the promisees cannot join in enforcing it.⁷⁴ A complaint need not state the date of the contract upon which the action is brought.⁷⁵

Estoppel is not available by way of defense where a plaintiff who is, by contract, entitled to the property of the decedent, in ignorance of her rights, and in the expectation that a will will be discovered, accepts a portion of the estate which she would have inherited as heir, coupling her acceptance with a protest that she is entitled to all the property.⁷⁶

Damages

When action is brought upon the contract, the measure of damages is the value of the property agreed to be conveyed by will;⁷⁷

⁶⁹ *Tussey v. Owen*, 139 N. C. 457, 52 S. E. 128.

⁷⁰ *Cann v. Cann's Heirs*, 45 W. Va. 563, 31 S. E. 923; *Story v. Story* (Ky.) 61 S. W. 279; *Lawson v. Mullinix*, 104 Md. 156, 64 Atl. 938; *Lipe v. Houck*, 128 N. C. 115, 38 S. E. 297; *Green v. Orgain* (Tenn. Ch. App.) 46 S. W. 477; *Warden v. Hinds*, 163 Fed. 201, 90 C. C. A. 449, 25 L. R. A. (N. S.) 529.

⁷¹ *Edwards v. State*, 184 Mass. 317, 68 N. E. 342.

⁷² *Whitcomb v. Whitcomb*, 92 Hun, 443, 36 N. Y. Supp. 607; *Williams v. Williams*, 58 Hun, 610, 12 N. Y. Supp. 599, reversing (Sup.) 11 N. Y. Supp. 753, 25 Abb. N. C. 217.

⁷³ *Day v. Washburn*, 76 N. H. 203, 81 Atl. 474.

⁷⁴ *Myers v. Cronk*, 45 Hun, 401.

⁷⁵ *Purviance v. Purviance*, 14 Ind. App. 269, 42 N. E. 364.

⁷⁶ *Howe v. Watson*, 179 Mass. 30, 60 N. E. 415.

⁷⁷ *Benge v. Hiatt's Adm'r*, 82 Ky. 666, 56 Am. Rep. 912; *Wellington v. Apthorp*, 145 Mass. 69, 13 N. E. 10; *Andrews v. Brewster*, 124 N. Y. 433, 26 N. E. 1024; *Dill v. Harbeck*, 49 Hun, 609, 1 N. Y. Supp. 832; *Graham v. Graham's Ex'rs*, 34 Pa. 475.

But in an action for breach of an agreement to give a legacy, in consideration of an extension of time for payment of past services the recovery allowed was the reasonable value of such services, and not the amount of the

when in general assumpsit, the value of the services or other consideration furnished in reliance on the promise.⁷⁸ The fact that any provision which might have been made in the will would have been ineffectual, by reason of the insolvency of the estate, does not limit the recovery, in an action for breach of contract, to nominal damages, since the provision contemplated was for absolute compensation, and the measure of damages is the loss sustained by reason of failure to make such provision.⁷⁹ Neither is the right of action defeated by the fact that the damages are referable to the amount of the residuary estate, which at the time of beginning suit is uncertain, by reason of the failure of the executors to account.⁸⁰

Remedy in Equity

The relief, analogous to specific performance, as stated in the black-letter text, is based upon the theory that the parties who take, by reason of the decedent's failure to make the will contracted for, do so as trustees of the promisee, and that they will be compelled to convey to him the property to which, under the contract for the will, he is in equity entitled.⁸¹ The common statement that courts of equity will specifically enforce contracts to make a will is obviously inaccurate. Nobody can make a will of property, save its owner. All that is meant is that the same results will be gained by proceedings in equity, which would have been attained, had the will been executed in compliance with the contract. The relief given, however, is referable to the jurisdiction of courts of equity in the matter of specific performance.

The trust thus raised in behalf of the promisee is enforceable against the heirs, devisees, legatees, and personal representatives of the promisor, and against purchasers with notice.⁸² And where

legacy promised. *Murtha v. Donohoo*, 149 Wis. 481, 134 N. W. 406, 136 N. W. 158, 41 L. R. A. (N. S.) 246.

⁷⁸ *Succession of McNamara*, 48 La. Ann. 45, 18 South. 908; *Laird v. Laird*, 115 Mich. 352, 73 N. W. 382; *Day v. Washburn*, 76 N. H. 203, 81 Atl. 474; *Collier v. Rutledge*, 136 N. Y. 621, 32 N. E. 626; *Whetstine v. Wilson*, 104 N. C. 365, 10 S. E. 471.

⁷⁹ *Collier v. Rutledge*, 136 N. Y. 621, 32 N. E. 626.

⁸⁰ *Andrews v. Brewster*, 124 N. Y. 433, 26 N. E. 1024.

⁸¹ *BOLMAN v. OVERALL*, 80 Ala. 451, 2 South. 624, 60 Am. Rep. 107, *Dunmore Cas. Wills*, 38; *Whiton v. Whiton*, 76 Ill. App. 553; *Baker v. Syfritt*, 147 Iowa, 49, 125 N. W. 998; *Parsell v. Stryker*, 41 N. Y. 480; *Kelley v. Devin*, 65 Or. 211, 132 Pac. 535.

⁸² *BOLMAN v. OVERALL*, 80 Ala. 451, 2 South. 624, 60 Am. Rep. 107, *Dunmore Cas. Wills*, 38; *Whiton v. Whiton*, 76 Ill. App. 553; *Thomas v. Feese* (Ky.) 51 S. W. 150; *Winne v. Winne*, 166 N. Y. 263, 59 N. E. 832, 82 Am. St. Rep. 647; *Goldstein v. Goldstein*, 35 Misc. Rep. 251, 71 N. Y. Supp. 807; *Johannes v. Martian*, 22 App. Div. 561, 48 N. Y. Supp. 102; *Heath v. Heath*, 18

the promisee has acted upon the strength of the promise, and the promisor, in his lifetime, repudiates the contract, and makes a different testamentary disposition of the property in question, equity will give the promisee relief during the lifetime of the promisor, by fixing upon the property a resulting trust in his favor.⁸³

The usual principles controlling in the law of specific performance obtain in enforcing trusts of this character. The contract to make the will must be clear and certain,⁸⁴ reasonable,⁸⁵ and founded upon a sufficient consideration.⁸⁶ Laches in bringing the action in equity is a bar to its maintenance.⁸⁷

Parties

Ordinarily the personal representatives should be included among the parties defendant to a bill to compel the conveyance of land contracted to be devised to the plaintiff by will,⁸⁸ but in an action brought against the sole devisee of land for this purpose, where the property has been turned over to the latter, neither the executor nor the heirs at law are necessary parties;⁸⁹ nor is the

Misc. Rep. 521, 42 N. Y. Supp. 1087; *Colby v. Colby*, 81 Hun, 221, 30 N. Y. Supp. 677, 24 Civ. Proc. R. 148; *In re Keep's Will*, 1 Con. Sur. 104, 2 N. Y. Supp. 750; *Emery v. Darling*, 50 Ohio St. 160, 33 N. E. 715; *In re Hoffner's Estate*, 161 Pa. 331, 29 Atl. 33; *Fogle v. Church*, 48 S. C. 86, 26 S. E. 99; *Smith v. Pierce*, 65 Vt. 200, 25 Atl. 1092; *Synge v. Synge*, 9 Rep. 265; 1 Q. B. (1894) 466.

A trust thus raised in favor of the promisee is good against promisor's wife, who married promisor after the contract was made, without notice thereof. *Dillon v. Gray*, 87 Kan. 129, 123 Pac. 878.

⁸³ *Duvale v. Duvale*, 54 N. J. Eq. 581, 35 Atl. 750.

⁸⁴ *Mundorff v. Kilbourn*, 4 Md. 459; *Shakespeare v. Markham*, 72 N. Y. 400; *Sprinkle v. Hayworth*, 26 Grat. (Va.) 384.

⁸⁵ *Owens v. McNally*, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369; *Wallace v. Rappleye*, 103 Ill. 229.

⁸⁶ *Richardson v. Orth*, 40 Or. 252, 66 Pac. 925, 69 Pac. 455, where an agreement whereby decedent was to will her estate of \$4,000 to her stepdaughter in consideration that the latter would live with the decedent and her husband and care for the husband during his illness was held not to be supported by a sufficient consideration to warrant specific performance, where it appeared that the daughter actually cared for her father for only a month, when she was relieved from her duties by his removal to other quarters, and where she continued her regular occupation during the entire period.

⁸⁷ *Jones v. Perkins* (C. C.) 76 Fed. 82, where a delay of seven years after the death of the decedent was held a bar to an action brought against his heir, who had been continuously in possession for six of these years, no concealment or fraud by him being alleged, and the only excuse offered for the delay being that the complainant "supposed until recently" that the contract could not be enforced.

⁸⁸ *Cole v. Society*, 64 N. H. 445, 14 Atl. 73.

⁸⁹ *Belt v. Lazenby*, 126 Ga. 767, 56 S. E. 81; *Fogle v. Church*, 48 S. C. 86, 26 S. E. 99.

administratrix, in an action to recover all the property of the decedent, brought against his heirs and next of kin.⁹⁰ It can hardly be doubted, however, that the administratrix, under these circumstances, would be a proper, though perhaps not a necessary, party. A case could hardly be put in which the personal representative would be regarded as being improperly joined.

Probate courts have ordinarily no jurisdiction in proceedings of this character, and, if proceedings are had there, they cannot amount to an adjudication against the right to maintain a suit in equity to enforce the trust.⁹¹

A conveyance made to a mere volunteer, and in fraud of the promisee's rights under a contract for a will to be made in his favor, may be set aside in a suit in equity brought by the promisee against the grantee for that purpose.⁹²

JOINT, MUTUAL, OR RECIPROCAL WILLS

21. Joint, and mutual or reciprocal, wills usually arise from agreement:

- (a) A joint will is a will executed jointly by two or more owners of property, as a means of transferring their several titles to one devisee.
- (b) Mutual or reciprocal wills are those in which two or more persons make reciprocal testamentary provisions in favor of each other, whether they unite in one will, or each executes a separate instrument.

Joint Wills

The courts have differed in their interpretation of the meaning of the words "joint" and "mutual" as applied to testamentary dispositions,⁹³ and whether there is any essential distinction between joint and mutual wills may be doubted. But the joint will that was originally regarded as objectionable was one undertaking to dispose of joint property to some third party after the death of all the testators.⁹⁴ Such instruments were said to be unknown to Eng-

⁹⁰ *Williams v. Williams* (Sup.) 11 N. Y. Supp. 753, 25 Abb. N. C. 217.

⁹¹ *Everdell v. Hill*, 27 Misc. Rep. 285, 58 N. Y. Supp. 447.

⁹² *Carmichael v. Carmichael*, 72 Mich. 76, 40 N. W. 173, 1 L. R. A. 596, 16 Am. St. Rep. 528; *Riley v. Allen*, 54 N. J. Eq. 495, 35 Atl. 654; *Kastell v. Hillman*, 53 N. J. Eq. 49, 30 Atl. 535.

⁹³ A testamentary disposition contained in one writing disposing of property held jointly is a "joint will"; whereas, the same document, if it refers to and deals with property held separately, would be a "mutual will." *Deseigneur v. Rondel*, 76 N. J. Eq. 394, 74 Atl. 703.

⁹⁴ See note 20 Har. Law Rev. 315.

lish testamentary law.⁹⁵ But even in England it was held that probate might be had as to one of two parties to a joint will.⁹⁶ And it is now the general rule both in England and the United States that joint wills are valid,⁹⁷ unless the testators join in one instrument for the complete disposition of their joint property, or of their separate property treated as joint property, and the instrument is not to take effect until the death of the survivor.⁹⁸

A valid joint will is well illustrated in *Goods of Lovegrove*.⁹⁹ The essential parts of the instrument, which was duly executed, were as follows: "We, Hannah Lovegrove and Letitia Lovegrove, being desirous that, as we are now living mutually together upon the joint savings of each other, at the death of either, * * * the survivor should have all that remains, and we further desire that at the death of the said survivor, should there be any money left at her decease, we wish it to be divided between our nephews and niece hereinafter named." Hannah died first, and the will was probated as that of Letitia, upon the death of the latter. No doubt, it might also have been probated as Hannah's will, upon her death. Indeed, the rule, in case of joint wills, is that they should be probated, upon the death of each testator, as his separate will.¹

⁹⁵ *Lord Denlington v. Pulteney*, 1 Camp. 268; *Hobson v. Blackburn*, 1 Add. 267. See, also, *Clayton v. Liverman*, 19 N. C. 558.

⁹⁶ *In re Stracey*, 1 Deane & S. 6; *Denyssen v. Mostert*, L. R. 4 P. C. 236. See *Lewis v. Schofield*, 26 Conn. 452, 68 Am. Dec. 404.

⁹⁷ *Schumaker v. Schmidt*, 44 Ala. 454, 4 Am. Rep. 135; *Evans v. Smith*, 28 Ga. 98, 73 Am. Dec. 751; *State Bank v. Bliss*, 67 Conn. 317, 35 Atl. 255; *Baker v. Syfritt*, 147 Iowa, 49, 125 N. W. 998; *Walker v. Walker*, 14 Ohio St. 157, 82 Am. Dec. 474; *Betts v. Harper*, 39 Ohio St. 639, 48 Am. Rep. 477; *Breathitt v. Whittaker's Ex'rs*, 8 B. Mon. (Ky.) 530; *Hershy v. Clark*, 35 Ark. 17, 23, 37 Am. Rep. 1; *In re Lovegrove*, 2 Sw. & Tr. 453; *In re Raine*, 1 Sw. & Tr. 144.

⁹⁸ *Hershy v. Clark*, 35 Ark. 17, 37 Am. Rep. 1; *State Bank v. Bliss*, 67 Conn. 317, 35 Atl. 255; *GERBRICH v. FREITAG*, 213 Ill. 552, 73 N. E. 338, 104 Am. St. Rep. 234, 2 Ann. Cas. 24, *Dunmore Cas. Wills*, 43.

The objection to wills of this character is thus stated by Prof. Bigelow: "Suppose two or more should join in making a single will, declaring in deliberate and technical language, 'We jointly give and devise' the property named. * * * By analogy to contract, * * * it would require the joint act of all the testators to revoke the instrument so long as they lived; towards each alone it would be irrevocable. After the death of one the joint nature of the instrument would be destroyed; but as before that event none of the testators could revoke the instrument without the consent of all, it is extremely doubtful if the instrument could be regarded as a true will." *Big. Wills*, p. 112.

⁹⁹ 2 Sw. & Tr. 453.

¹ *Evans v. Smith*, 28 Ga. 98, 73 Am. Dec. 751; *Hill v. Harding*, 92 Ky. 76, 17 S. W. 199, 437; *Keith v. Miller*, 174 Ill. 64, 51 N. E. 151; *In re Davis' Will*,

A joint will, conditioned upon the simultaneous death of the makers, cannot operate in event of the condition being unfulfilled.²

Mutual Wills

Mutual wills, as defined in the black-letter text, are of unquestioned validity.³ If not made in pursuance of a contract to that end, they, as well as joint wills, are, of course, revocable at the pleasure of the testator.⁴ If made in compliance with a contract, they may still be revoked, but the same remedies exist in favor of the injured party as in other cases of breach of contract to make a will, viz., an action on the contract, or a remedy in equity against the parties taking title by reason of the failure of the promisor to make the will contracted for.⁵ To obtain relief in equity, the contract must be clearly and definitely established,⁶ and the mere fact of the execution of mutual separate wills is not sufficient evidence in itself to show that the wills were made pursuant to a contract.⁷

120 N. C. 9, 26 S. E. 636, 38 L. R. A. 289, 58 Am. St. Rep. 771; *Betts v. Harper*, 39 Ohio St. 652, 48 Am. Rep. 477; *Wyche v. Clapp*, 43 Tex. 544.

² *Goods of Hugo*, 2 P. D. 73.

³ *Carle v. Miles*, 89 Kan. 540, 132 Pac. 146; Ann. Cas. 1915A, 363; *In re Diez's Will*, 50 N. Y. 88; *In re Cawley's Estate*, 136 Pa. 628, 20 Atl. 567, 10 L. R. A. 93; *Schumaker v. Schmidt*, 44 Ala. 454, 4 Am. Rep. 135; *Rastetter v. Hoenninger*, 214 N. Y. 66, 108 N. E. 210; *Edson v. Parsons*, 155 N. Y. 555, 50 N. E. 265.

⁴ *Hill v. Harding*, 92 Ky. 76, 17 S. W. 199, 437; *Coghlin v. Coghlin*, 26 Ohio Cir. Ct. R. 18; *In re Cawley's Estate*, 136 Pa. 628, 20 Atl. 567, 10 L. R. A. 93.

⁵ *Edson v. Parsons*, 155 N. Y. 555, 50 N. E. 265, affirming 85 Hun, 263, 32 N. Y. Supp. 1036; *Everdell v. Hill*, 27 Misc. Rep. 285, 58 N. Y. Supp. 447; *Brown v. Webster*, 90 Neb. 591, 134 N. W. 185, 37 L. R. A. (N. S.) 1190; *Trustees of Reformed Church of Uniontown v. Wise*, 17 Ohio Cir. Ct. R. 659.

⁶ *Herrick v. Snyder*, 27 Misc. Rep. 462, 59 N. Y. Supp. 229.

⁷ *Wanger v. Marr*, 257 Mo. 482, 165 S. W. 1027; *Edson v. Parsons*, 155 N. Y. 555, 50 N. E. 265.

In the case of a joint will, as distinguished from mutual, separate wills, the will itself has been considered sufficient evidence of a contract to keep the will unrevoked, *Rastetter v. Hoenninger*, 151 App. Div. 853, 136 N. Y. Supp. 861; *Dufour v. Pereira*, 1 Dick. 419.

CHAPTER V

WHO MAY BE A TESTATOR

- 22-24. General Rule.
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- 48. Burden of Proof.
- 49. Evidence Relating to Testamentary Capacity.
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GENERAL RULE

- 22. Any person may make a will who is not disqualified therefor by reason of either legal or natural incapacity.
- 23. Legal incapacity exists or has existed, to an extent, in the case of
 - (a) Married women.
 - (b) Aliens.
 - (c) Certain classes of criminals.
- 24. Natural incapacity exists when a person has not sufficient mental capacity to perform the testamentary act.

Leaving aside for the moment questions of legal incapacity, the courts, on the whole, have shown a strong disposition to uphold and extend the power to dispose of property by will. It used to be said that a person who has been from his nativity blind, deaf, and dumb is incapable of making a will, as he wants those senses through which ideas are received into the mind.¹ But when, as has been shown in the case of Miss Helen Keller, the sense of touch

¹ 1 Jar. Wills, 47, citing Co. Litt. 42b.

may be availed of as a medium through which the intelligence can be aroused and ideas acquired, the reason for the rule disappears, and while, in such an instance, evidence would be required to show both testamentary capacity and knowledge by the testator of the contents of the will, together with a full and satisfactory explanation as to the means of communication employed, yet, these requirements once met, there can be no doubt that a person born with only the sense of touch might make a valid will.

Blind Testators

Blindness or deafness alone produces no incapacity.² It was the rule in the ecclesiastical law that while a blind man might make a nuncupative will by making declaration to that end before a sufficient number of witnesses, he could not make a testament in writing unless the same be read before witnesses and in their presence acknowledged by the testator as his last will; and that, therefore, if a writing be delivered to the testator, and he, not hearing the same read, acknowledged it for his will, this would not be sufficient.³ Such also was the requirement of the civil law. But no such strictness of proof is now required. Provided there be proof aliunde of a clear knowledge of the contents of the instrument, a will need not be read over to a blind testator prior to its execution.⁴ But it is the part of caution to thus read over the proposed will to a testator who is blind, and it should always be done when circumstances admit of it.

An illiterate stands on the same footing as a blind testator. In neither case does the ordinary presumption that a person executing a will knows and approves of its contents prevail, and proof must be made that the contents were made known to the testator.⁵

Deaf and Dumb Testators

In the case of testators, deaf and dumb from birth, there is said to be a presumption of testamentary incapacity; but this presumption may be overcome, and their wills probated, upon satisfactorily establishing the fact that the document sets forth the real wishes

² Ray v. Hill, 3 Strob. (S. C.) 297, 49 Am. Dec. 647; Goods of Percy, 1 Rob. 278; In re Mullen, 5 Ir. Eq. 309; Wilson v. Mitchell, 101 Pa. 495, 503.

³ 1 Wms. Ex'rs, 22, citing Swinb. pt. 2, § 11; Godolph, pt. 1, c. 11; Barton v. Robins, 3 Phil. 455, note b.

⁴ Longchamp dem. Goodfellow v. Fish, 5 B. & P. 415; Edwards v. Fincham, 3 Curt. 63, 7 Jur. 25; Mitchell v. Thomas, 6 Moo. P. C. C. 137; Boyd v. Cook, 3 Leigh (Va.) 32; Lewis v. Lewis, 6 Serg. & R. (Pa.) 496; Clifton v. Murray, 7 Ga. 564, 50 Am. Dec. 411; Wampler v. Wampler, 9 Md. 540; 1 Jar. Wills (Big. Ed.) 47.

⁵ Barton v. Robins, 3 Phil. 455, note b; Day v. Day, 3 N. J. Eq. 549; Rollwagen v. Rollwagen, 63 N. Y. 504; Maxwell v. Hill, 89 Tenn. 584, 15 S. W. 253.

of the ostensible testator.⁶ Perhaps the truer presumption would have been lack of means adequately to express testamentary wishes than lack of capacity to entertain them. At present, at least, it is very doubtful if any presumption against testamentary capacity is entertained with regard to such persons.⁷ There should be no such presumption, whether testator was born deaf and dumb, or subsequently became so.⁸ Where a deaf and dumb testator can read and write, no reason exists why his will should not be treated precisely like that of any testator.⁹ If such a testator cannot write, he may make known his wishes by signs, and these wishes, as thus manifested, may be reduced to writing, and the instrument signed with the testator's mark. Full proof as to the character of the signs used may be required by the court, and apparently, if the signs used are other than those employed to represent the letters of the alphabet, there must be some rational and natural connection between them and the wishes signified thereby.¹⁰

WILLS OF MARRIED WOMEN AT COMMON LAW

25. By virtue of the merger of the wife's identity with that of her husband, a married woman could not, as a rule, make a valid will at common law, except
- (a) Where the husband gave his consent to her will disposing of personal property.
 - (b) Where, as executrix of a will, she by will appointed a successor to herself as executrix.
 - (c) Where she made a will of property under a power conferred upon her by a will or other instrument.
 - (d) Where she, by will, disposed of property given to her to her sole and separate use.

The wife's incapacity to make a valid testament of personal property at common law, arose from no natural infirmity on her part, but followed from the common-law doctrine that the husband and

⁶ 1 Wms. Ex'rs, 21; Swinb. pt. 2, § 4, pl. 2; Godolph, pt. 1, c. 11; Brower v. Fisher, 4 Johns. Ch. (N. Y.) 441; Christmas v. Mitchell, 38 N. C. 535; Potts v. House, 6 Ga. 324, 50 Am. Dec. 329; Dickenson v. Blisset, 1 Dick. 268.

⁷ Potts v. House, 6 Ga. 324, 50 Am. Dec. 329.

⁸ No such presumption ever existed respecting persons born with all their senses, and who, after developing full intelligence, became deaf and dumb. See 1 Wms. Ex'rs, 22.

⁹ See 1 Redf. Wills, 52.

¹⁰ Goods of Geale, 3 Sw. & Tr. 431. For a case refusing probate of a will because of the unsatisfactory account of the method in which the instructions of the deceased were taken, see Goods of Owston, 2 Sw. & Tr. 461.

wife were one person, in legal contemplation, in consequence of which the husband acquired absolute title to all his wife's choses in possession, and to all choses in action which he reduced to possession during her lifetime, while he was entitled as her administrator to such of her choses in action as he had not already reduced to possession. With such rights existing in behalf of the husband, it is obvious that a power to defeat them by will could not exist on the part of the wife.

Although, at common law, the husband acquired only a freehold estate in his wife's realty during their joint lives, and a life estate in such realty after his wife's death, if living issue were born of the marriage,¹¹ the fact that legal titles in freehold estates were not devisable according to feudal doctrines naturally prevented the raising of the question as to the right of a feme covert to devise the interest in her land not acquired by her husband.

While the terms of the statute of wills seemed broad enough to include married women,¹² a statute passed three years later provided "that wills or testaments of any manors, lands, tenements or hereditaments, by any woman covert, shall not be taken to be good or effectual in law."¹³

Will with Consent of Husband

A married woman could not make a will of lands even with her husband's consent.¹⁴ But his rights in her personalty could be waived with his consent. Hence the will of a married woman, disposing only of personalty, assented to by her husband, was valid. But a general assent that she make a will was not enough. Consent to the will in question must be shown,¹⁵ and it should be given at the time of probate.¹⁶ Hence this consent may be revoked at any time during the life of the wife, or after her death before probate.¹⁷ But consent may be implied from circumstances,¹⁸ and if, after her

¹¹ Burdick on Real Property, pp. 102-106.

¹² 32 Hen. VIII, c. 1 (1540), provided "that all and every person," having lands, might devise them.

¹³ 34 & 35 Hen. VIII, c. 5, § 14.

¹⁴ OSGOOD v. BREED, 12 Mass. 525, Dunmore Cas. Wills, 46; Bunnell v. Hixon, 205 Mass. 468, 91 N. E. 1022; Marston v. Norton, 5 N. H. 205; Van Winkle v. Schoonmaker, 15 N. J. Eq. 384.

¹⁵ Rex v. Bettesworth, 2 Stra. 891. See, also, George v. Bussing, 15 B. Mon. (Ky.) 558; Cutter v. Butler, 25 N. H. 357, 57 Am. Dec. 330; Williford v. Phelan, 120 Tenn. 589, 113 S. W. 365; 1 Wms. Ex'rs, 78.

¹⁶ Henley v. Phillips, 2 Atk. 49.

¹⁷ Swinb. pt. 2, § 9, pl. 10; 1 Wms. Ex'rs, 79; Van Winkle v. Schoonmaker, 15 N. J. Eq. 384; In re Wagner's Estate, 2 Ashm. (Pa.) 448.

¹⁸ Cutter v. Butler, 25 N. H. 357, 57 Am. Dec. 330; Smellie's Ex'r v. Reynolds, 2 Desaus. (S. C.) 66.

death, the husband acted upon the will, or at once agreed to it, he could not, apparently, thereafter withdraw his consent.¹⁹

This assent on the part of the husband really amounted to nothing more than a waiver of his right to administer upon the estate of his wife. Hence it gave validity to the instrument only in event of his being the survivor. If he died before the wife, her will was void as against her next of kin, in so far as it derived validity from his consent.²⁰ Inasmuch as his consent was required to the particular will, it could not pass subsequently acquired property.²¹

Appointment of Executrix by Will

At common law, an executor could, by will, appoint an executor to complete his unfinished trust. The same power could be exercised by a married woman acting as executrix of a will.²²

Will under a Power

A married woman may make a testamentary disposition of her real estate under a power, by way of execution of such power.²³ Such power may be conferred by a settlement either before or after marriage,²⁴ and may emanate either from her husband or a stranger.²⁵ In the case of personal estate held by her to her sole and separate use, the power to dispose thereof by will exists as a necessary incident to the separate estate, though it is sometimes held that her real estate thus held cannot be devised except under a power expressly conferred.²⁶

Where a will is made by a married woman under a power, her executors do not take as representatives of the testatrix, but merely, under the power which she was authorized to execute by making a will as to particular property. Hence they can take nothing by virtue of the will save the particular property in question.²⁷

Will of Separate Property

Under an equitable doctrine, when personal property is actually given or settled, or is agreed to be given or settled, to the sole

¹⁹ 1 Wms. Ex'rs, 79.

²⁰ Id.

²¹ 1 Redf. Wills, 25.

²² Scammell v. Wilkinson, 2 East, 552; Willock v. Noble, L. R. 7 Eng. & Ir. App. 580.

²³ 2 Kent, Comm. 171, 172; 4 Kent, Comm. 50, 506; Wing v. Deans, 214 Mass. 546, 102 N. E. 313; Bradish v. Gibbs, 3 Johns. Ch. (N. Y.) 523; Anderson v. Miller, 6 J. J. Marsh. (Ky.) 573; West v. West, 10 Serg. & R. (Pa.) 447; Rich v. Cockell, 9 Ves. 375; Hodsden v. Lloyd, 2 Br. C. C. 534.

²⁴ 4 Kent, Comm. 505.

²⁵ Picquet v. Swan, 4 Mason, 443, Fed. Cas. No. 11,133. See, also, Holman v. Perry, 4 Metc. (Mass.) 492.

²⁶ Holman v. Perry, supra; OSGOOD v. BREED, 12 Mass. 525, Dunmore Cas. Wills, 46; Marston v. Norton, 5 N. H. 205.

²⁷ Tugman v. Hopkins, 4 M. & Gr. 389; O'Dwyer v. Geare, 1 Sw. & Tr. 465; 1 Wms. Ex'rs, 83.

and separate use of the wife, she may dispose of it, as a feme sole, to the full extent of her interest, although no particular form in which to do so is prescribed in the instrument by which the settlement or agreement is made.²⁸ This rule applies to the separate estate regardless of the method of its acquisition,²⁹ of whether the estate consists of personalty or realty,³⁰ or of the circumstance whether the property be in possession or reversion,³¹ vested or contingent.³² It is immaterial whether the property be given to trustees for the wife's separate use, or, without the intervention of trustees, to the wife herself for her own separate use and benefit;³³ for in the latter case the husband would, in equity, be regarded as trustee for the separate use of the wife.³⁴

WILLS OF MARRIED WOMEN UNDER STATUTES

26. By statute, the common-law disability of married women to make a will has been either wholly removed or largely modified. These statutes are of two classes:

- (a) Those enabling a married woman to dispose of her property as though she were sole.
- (b) Those by implication removing the common-law disability.

In England, by the Married Women's Property Act of 1882,³⁵ and by the act of 1893, married women are in terms enabled to acquire, hold, and dispose, by will or otherwise, of real or personal estate as though sole. Similar legislation has been enacted in the more important commercial states of the United States.³⁶

In many jurisdictions statutes providing that all persons, of age

²⁸ *Fettyplace v. Gorges*, 1 Ves. Jr. 46, 3 Br. C. C. 8; *Taylor v. Meads*, 2 De Gex, J. & S. 597; *Hall v. Waterhouse*, 11 Jur. N. S. 361, 12 Law T. (N. S.) 297; *Pride v. Bubb*, L. R. 7 Ch. App. 64; *Latouche v. Latouche*, 3 H. & C. 576; *Bestall v. Banbury*, 13 Ir. Ch. 549; *Johnson v. Gallagher*, 3 De Gex, F. & J. 494; *Burton v. Holly*, 18 Ala. 408; *Ela v. Edwards*, 16 Gray (Mass.) 91, 101; *Willard v. Eastham*, 15 Gray (Mass.) 328, 79 Am. Dec. 366; *Hughey v. Warner*, 124 Tenn. 725, 140 S. W. 1058, 37 L. R. A. (N. S.) 582; *Caldwell v. Renfrew*, 33 Vt. 213. See, also, 2 Kent, Comm. 170, 171; 2 Story, Eq. Jur. § 1394.

²⁹ 1 Wms. Ex'rs, 85.

³⁰ *Holman v. Perry*, 4 Metc. (45 Mass.) 492.

³¹ *Sturgis v. Carp*, 13 Ves. 190.

³² *Lechmere v. Brotheridge*, 32 Beav. 353.

³³ 1 Wms. Ex'rs, 86; *Braham v. Burchell*, 3 Add. 263; *Ela v. Edwards*, 16 Gray (Mass.) 91, 101.

³⁴ *Tappenden v. Walsh*, 1 Phil. 352; *Rolfe v. Budder*, Bunb. 187.

³⁵ 45 & 46 Vict. c. 75. See 1 Jar. Wills, 56, for important provisions.

³⁶ 1 Redf. Wills, 27.

and possessed of sound minds, may make valid wills, have been construed as extending full testamentary power to married women,³⁷ though similar statutes have not infrequently been construed otherwise.³⁸ Usually, in case of both classes of statutes, the husband's interest in the wife's property cannot be defeated by her will without his consent;³⁹ and the signature of a husband, as executor, to the petition for probate of his wife's will, and the giving of bond by him, is not such a written consent as is contemplated by a statute providing that a married woman's will shall not operate to deprive the husband of his interest in the wife's property without his written consent.⁴⁰ Where written consent of the husband is required, no consideration need pass to him to render such consent effective.⁴¹

Sometimes the separate estate of the wife has been so extended by statute that, by the application of the common-law rule respecting her power over this species of property, she has full testamentary power.⁴² Thus, under statutes conferring the power to devise her separate estate, a married woman may convey her separate real estate by will.⁴³ These statutes are frequently construed rather strictly. Thus, where a statute provided that a married woman might dispose of her separate estate by will properly executed and attested, it was held that she could not make a valid holographic will without attestation, although the validity of such wills, without attestation, was recognized by statute.⁴⁴

But legislation with reference to the testamentary capacity of married women varies widely, and in some jurisdictions their power in this respect is still greatly limited. The general tendency, however, is to treat husband and wife substantially alike in this respect.

³⁷ *Baker v. Syfritt*, 147 Iowa, 49, 125 N. W. 998; *Allen v. Little*, 5 Ohio, 65; *Bennett v. Hutchinson*, 11 Kan. 398.

³⁸ *Baker v. Chastang's Heirs*, 18 Ala. 417; *OSGOOD v. BREED*, 12 Mass. 525, *Dunmore Cas. Wills*, 46; *Marston v. Norton*, 5 N. H. 205.

³⁹ *Appeal of Cooke*, 132 Pa. 533, 19 Atl. 274; *Steward v. Middleton* (N. J.) 17 Atl. 294; *Stoutenburgh v. Hopkins*, 43 N. J. Eq. 577, 12 Atl. 689; *Staffan v. Zeust*, 16 App. D. C. 141.

Interest in community property may be devised without the consent of the husband. *Engleman v. Deal*, 14 Tex. Civ. App. 1, 37 S. W. 652.

⁴⁰ *Tyler v. Wheeler*, 160 Mass. 206, 35 N. E. 666.

⁴¹ *Erickson v. Robertson*, 116 Minn. 90, 133 N. W. 164, 37 L. R. A. (N. S.) 1133, *Ann. Cas.* 1913A, 493.

⁴² *Emmert v. Hays*, 89 Ill. 11; *Kelly v. Alred*, 65 Miss. 495, 4 South. 551.

⁴³ *Johnson v. Johnson* (Ky.) 24 S. W. 628; *Hickman v. Brown*, 88 Ky. 377, 11 S. W. 199; *Kiracofe v. Kiracofe*, 93 Va. 591, 25 S. E. 601; *Dillard v. Dillard's Ex'rs* (Va.) 21 S. E. 669.

⁴⁴ *Scott v. Harkness*, 6 Idaho, 736, 59 Pac. 556, citing *IN RE BILLINGS' ESTATE*, 64 Cal. 427, 1 Pac. 701, *Dunmore Cas. Wills*, 29.

WILLS OF ALIENS AND CRIMINALS

27. At common law an alien's will of personal property was valid, but his devise of lands was voidable.
28. At common law, treason and felony incapacitated persons from making a will of personal property. The devises of land made by felons were, by the better opinion, voidable; those of persons attainted of high treason were void.
29. The incapacity resulting from alienage has generally been removed by statute in this country, while that resulting from felony never existed here.

An alien, at common law, could acquire a valid title to personalty, and could consequently dispose of it by will. But his title to real property was defeasible upon office found; hence his will only vested the same defeasible title in the devisee.⁴⁵ If he died intestate, however, the land escheated to the crown, or other lord, because an alien could have no heirs.⁴⁶ These disabilities have been completely removed by statute in England,⁴⁷ and generally throughout the United States.

Wills of Felons

Persons attainted of high treason were formerly, in England, incompetent to devise lands, since by statute the real property of a traitor, by the attainder, ipso facto vested in the crown.⁴⁸ The devises of persons attainted of other felonies were also void.⁴⁹ Convicted felons could make no will of personalty, as this became forfeited to the crown upon conviction.⁵⁰ These disabilities have been substantially removed by statute,⁵¹ while forfeiture of estates for crimes has been either wholly abolished in the United States, or so much restricted by reason of constitutional provisions that it has no practical bearing upon the subject of wills.⁵²

⁴⁵ Shep. Touch. 404; 1 Jar. Wills, 58.

⁴⁶ Co. Litt. 2b; 1 Jar. Wills, 58.

⁴⁷ 33 Vict. c. 14, § 2.

⁴⁸ 1 Jar. Wills, 58.

⁴⁹ Shep. Touch. 404, where it is said: "A man that is attainted or convict of felony cannot make a testament of his lands or goods, for they are forfeit; but if a man be only indicted, and die before attainder, his testament is good for his lands and goods both."

⁵⁰ 2 Bl. Comm. 499; In re Thompson's Trusts, 22 Beav. 506; In re Bateman's Trusts, L. R. 15 Eq. 355.

⁵¹ 33 & 34 Vict. c. 23 (1870).

⁵² See RANKIN'S HEIRS v. RANKIN'S EX'RS, 6 T. B. Mon. (Ky.) 531, 17 Am. Dec. 161, Dunmore Cas. Wills, 47.

Article 1, § 9, of United States Constitution prohibits any state from passing

NATURAL INCAPACITY

30. Natural incapacity exists in the case of

(a) Infants.

(b) Those whose mental capacity does not meet the common statutory requirement that a testator must be of sound and disposing mind.

Infancy

While it is perhaps hardly fair to say that all persons who have not attained their majority are supposed to be without testamentary capacity, yet the lack of discretion characterizing those of tender years would be apt to result in an unwise exercise of such capacity, even assuming in the abstract that it existed. Hence the policy of the law at present is to deny this power to minors. Yet in England, up to 1837, males of the age of fourteen and females of the age of twelve could make valid wills of personal estate,⁵³ the civil law being followed in this respect. But by statute it is now provided that no will made by any person under the age of twenty-one shall be valid,⁵⁴ and there is similar legislation in most of the United States, though distinctions are sometimes made between the testamentary ages required for wills of real and personal property, and between those of male and female testators. The first distinction is manifestly purely arbitrary; it is possible, however, that the discrimination in favor of young women has some natural foundation. A girl of eighteen is ordinarily more mature than a boy of the same age, and possibly as much so as a youth of twenty-one.

It is thoroughly well settled that a person becomes of age for every purpose, including that of making a will, on the day before the twenty-first anniversary of his birthday. In point of fact, the disability might thus be removed in a little less than forty-eight hours before the age of twenty-one is actually reached.⁵⁵ This

a bill of attainder, and article 3, § 3, provides that no attainder of treason against the United States shall work corruption of blood or forfeiture, except during the life of the person attainted.

⁵³ Swinb. pt. 2, § 2, pl. 6; Godolph. pt. 2, c. 8, § 8; 1 Wms. Ex'rs, 18.

The statute of 34 and 35 Hen. VIII, c. 5, § 14 (1542-43), raised the age for making a valid devise to twenty-one for both sexes.

⁵⁴ 1 Vict. c. 26, § 7 (1837).

⁵⁵ "It has been adjudged that if one be born the first of February, at eleven at night, and the last of January in the twenty-first year of his age, at one o'clock in the morning, he makes his will of land, and dies, it is a good will, for he was then of age." Per Holt, C. J., in *Anonymous*, 1 Salk. 44. See, also, *State v. Clarke*, 3 Har. (Del.) 557; Swinb. pt. 2, § 2, pl. 7; 1 Bl. Comm. 463; 2 Kent, Comm. 233.

queer result is attained by applying the maxim that the law will not regard the fractional parts of a day. Judge Redfield criticises this result.⁵⁶

NATURE OF TESTAMENTARY CAPACITY.

31. Statutes universally require that testators shall be possessed of sound minds. A testator has a sound mind for testamentary purposes, only when he can understand and carry in mind, in a general way, the nature and situation of his property, and his relations to the persons around him, to those who naturally have some claim to his remembrance, and to those in whom, and the things in which, he has been chiefly interested. He must understand the act which he is doing, the disposition which he wishes to make of his property, and the relation in which he stands to the objects of his bounty and to those who ought to be in his mind on the occasion of making his will.

Many other statements have been made as to what constitutes testamentary capacity, but the courts have settled upon that above stated as a concrete and practical definition, and, in various forms, it has been reiterated in many cases.⁵⁷

⁵⁶ 1 Redf. Wills, 21.

⁵⁷ The statement in the black-letter text is taken substantially from *Whitney v. Twombly*, 136 Mass. 145. To similar effect, see *Burney v. Torrey*, 100 Ala. 157, 14 South. 685, 46 Am. St. Rep. 33; *Campbell v. Carnahan* (Ark.) 13 S. W. 1098; *St. Leger's Appeal*, 34 Conn. 434, 91 Am. Dec. 735; *Chandler v. Ferris*, 1 Har. (Del.) 454; *Jones v. Grogan*, 98 Ga. 552, 25 S. E. 590; *Nicewander v. Nicewander*, 151 Ill. 156, 37 N. E. 698; *Greene v. Greene*, 145 Ill. 264, 33 N. E. 941; *Wilsey v. Ellis*, 89 Ill. App. 632; *Blough v. Parry*, 144 Ind. 463, 40 N. E. 70, 43 N. E. 560; *Cline v. Lindsey*, 110 Ind. 337, 11 N. E. 441; *Bower v. Bower*, 146 Ind. 393, 45 N. E. 595; *Hanrahan v. O'Toole*, 139 Iowa, 220, 117 N. W. 675; *Howe v. Richards*, 112 Iowa, 220, 83 N. W. 909; *Hudson v. Hugan*, 56 Kan. 152, 42 Pac. 701; *Newcomb's Ex'r v. Newcomb*, 96 Ky. 120, 27 S. W. 997; *King v. King* (Ky.) 42 S. W. 347; *Dean v. Phillips* (Ky.) 61 S. W. 10; *Dunaway v. Smoot* (Ky.) 67 S. W. 62; *Hall v. Perry*, 87 Me. 569, 33 Atl. 160, 47 Am. St. Rep. 352; *Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 666; *Berry v. Deposit Co.*, 96 Md. 45, 53 Atl. 720; *Moriarty v. Moriarty*, 108 Mich. 249, 65 N. W. 964; *Spratt v. Spratt*, 76 Mich. 384, 43 N. W. 627; *Peninsular Trust Co. v. Barker*, 116 Mich. 333, 74 N. W. 508; *Crowson v. Crowson*, 172 Mo. 691, 72 S. W. 1065; *Martin v. Bowdern*, 158 Mo. 379, 59 S. W. 227; *Southworth v. Southworth* (1903) 173 Mo. 59, 73 S. W. 129; *SEHR v. LINDEMANN* (1899) 153 Mo. 276, 54 S. W. 537; *Dunmore Cas. Wills*, 49; *Thompson v. Ish*, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552; *Claffey v. Ledwith*, 56 N. J. Eq. 333, 38 Atl. 433; *Bennett v. Bennett*, 50 N. J. Eq. 439, 26 Atl. 573; *Hampton v. Westcott*, 49 N. J. Eq. 522, 25 Atl. 254; *Stoutenburgh v. Hop-*

Briefer Statement

More briefly and generally, it is sometimes said that it is enough if the mind and memory of the testator are sound enough to enable him to know and understand the business in which he was engaged at the time when he executed the will in question.⁵⁸ Or, the testator must have been capable of acting rationally in the ordinary affairs of life, and of intelligently comprehending his disposition of his property.⁵⁹ Or, the testator must understand the effect and consequences of his act at the time the will is executed.⁶⁰

Erroneous Tests

Any test which requires either greater or less mental capacity than that involved in the black-letter text is erroneous. Hence instructions that, in determining testamentary capacity, the jury should determine whether or not the testatrix knew the nature and extent of her property,⁶¹ or that there must be sufficient mind and memory to understand the obligations of the testatrix, if any

kins, 43 N. J. Eq. 577, 12 Atl. 689; O'Brien v. Dwyer, 45 N. J. Eq. 689, 17 Atl. 777; McCoon v. Allen, 45 N. J. Eq. 708, 17 Atl. 820; Ledwith v. Claffey, 18 App. Div. 115, 45 N. Y. Supp. 612; Ivison v. Ivison (1903) 80 App. Div. 599, 80 N. Y. Supp. 1011; In re Townsend's Will, 75 Hun, 593, 27 N. Y. Supp. 603; In re Lewis' Will, 81 Hun, 213, 30 N. Y. Supp. 675; In re Blair, 16 N. Y. Supp. 874, 16 Daly, 540; In re Snelling's Will, 78 Hun, 211, 28 N. Y. Supp. 942; Kettemann v. Metzger, 23 Ohio Cir. Ct. R. 61; Chrisman v. Chrisman, 16 Or. 127, 18 Pac. 6; Miller v. Oestrich, 157 Pa. 264, 27 Atl. 742; Shaver v. McCarthy, 110 Pa. 339, 5 Atl. 614; In re Cardwell's Estate, 10 Pa. Co. Ct. R. 318; In re Hoyt's Estate (Pa.) 10 Kulp, 166; Ford v. Ford, 7 Humph. (Tenn.) 92; Prather v. McClelland, 76 Tex. 574, 13 S. W. 543; Trezevant v. Rains, 85 Tex. 329, 23 S. W. 890; Greer v. Greer, 9 Grat. (Va.) 330; Martin v. Thayer, 37 W. Va. 38, 16 S. E. 489; In re Butler's Will, 110 Wis. 70, 85 N. W. 678; In re Farnsworth's Will, 62 Wis. 474, 22 N. W. 523.

⁵⁸ APPEAL OF STURDEVANT, 71 Conn. 392, 42 Atl. 70, Dunmore Cas. Wills, 65; ROWCLIFFE v. BELSON, 261 Ill. 566, 104 N. E. 268, Ann. Cas. 1915A, 359, Dunmore Cas. Wills, 52; Warren v. Ellis (Tex. Civ. App.) 137 S. W. 1182.

So it is said that a testator has sufficient capacity, if, when his attention is aroused, his mind acts clearly and with discriminating judgment in respect to the act to be done and its relations. Bevelot v. Lestrade, 153 Ill. 625, 38 N. E. 1056.

⁵⁹ Keithley v. Stafford, 126 Ill. 507, 18 N. E. 740.

⁶⁰ Wilkinson v. Service, 249 Ill. 146, 94 N. E. 50, Ann. Cas. 1912A, 41; Baptist v. Baptist, 23 Can. Sup. 37.

⁶¹ Brown v. Mitchell, 75 Tex. 9, 12 S. W. 606, where court said: "It may be doubted if charges enumerating so many things have a tendency to enable juries as clearly to understand their duties in such cases as would a simple charge to the effect that one had testamentary capacity of his mind and memory, at the time the paper was executed, were they sufficiently sound to enable him to know and understand what he was doing, and the effect of his act."

are shown to exist, towards any person,⁶² or that the testator must be capable of recalling all his property, and its amount, condition, and situation, of estimating and dividing it out, of comprehending the scope and bearings of the provisions of the will, of recalling all the persons who come reasonably within the range of his bounty, and all he had previously done for any and each of them,⁶³ or that the testator should have the ability to remember and call to mind all the items of his property, and to know and appreciate the value of each item,⁶⁴ or that the fact that the testator's mind was impaired by age or disease, if not to the point of lunacy or absolute imbecility, would not take away his legal capacity to make a will,⁶⁵ are incorrect.

Not to be Left to Jury When

The issue of testamentary capacity should not be left to the jury when there is no evidence that the testator did not understand the business about which he was engaged when executing his will, or that he did not know the natural objects of his bounty, or what property he had.⁶⁶

Ability to Meet the Test

It is not necessary that the testator should actually call to mind and retain in memory the various matters enumerated in the black-letter text. A testator whose capacity was undisputed might fail to do so, yet his will would be valid.⁶⁷ A capacity to recollect all his property, the objects of his bounty, etc., is enough. It is not necessary to prove actual recollection and knowledge.⁶⁸

Test Applied with Reference to Time of Execution

Except in so far as it may tend to show the state of the testator's mind at the time of executing the will,⁶⁹ the condition of his mind

⁶² *Bulger v. Ross*, 98 Ala. 267, 12 South. 803.

⁶³ *Couch v. Gentry*, 113 Mo. 248, 20 S. W. 890.

So the testator need not have a "clear" recollection of his property, as well as the natural relations of family and blood. *Kischman v. Scott*, 166 Mo. 214, 65 S. W. 1031. Neither does "unsoundness of mind" mean the same thing as "insanity." *Wallis v. Luhring*, 134 Ind. 447, 34 N. E. 231. A requirement that testatrix comprehend the "particular thing" in which she might be engaged is too high a test, if it referred to everything in which she might be engaged. *Coleman v. Marshall*, 263 Ill. 330, 104 N. E. 1042.

⁶⁴ *Reichenbach v. Ruddach*, 127 Pa. 564, 18 Atl. 432.

⁶⁵ *Campbell v. Campbell*, 130 Ill. 466, 22 N. E. 620, 6 L. R. A. 167.

⁶⁶ *Cash v. Lust*, 142 Mo. 630, 44 S. W. 724, 64 Am. St. Rep. 576; *In re Tallman's Estate*, 148 Pa. 286, 23 Atl. 986; *In re Knight's Estate*, 167 Pa. 453, 31 Atl. 682.

⁶⁷ *In re Livingston's Will* (N. J. Prerog.) 37 Atl. 770.

⁶⁸ *Huffaker v. Beers*, 95 Ark. 158, 128 S. W. 1040; *Roller v. Kling*, 150 Ind. 159, 49 N. E. 948; *In re Livingston's Will* (N. J. Prerog.) 37 Atl. 770; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668.

⁶⁹ See post, p. 119.

at any other time is unimportant. If he has testamentary capacity at the time of executing the will, it is valid; otherwise not.⁷⁰ And this though a statute giving testamentary capacity be subsequently passed.⁷¹ But, if a will be executed by an incompetent testator, the execution of a codicil, when testamentary capacity has been restored, republishing the will, is sufficient to give it validity.⁷²

A few courts have taken the position that the existence of testamentary capacity at the time of giving instructions for the making of a will may affect the measure of capacity which must exist at the time of execution. Accordingly it has been held that, where requisite mental capacity to make a valid will existed at the time of giving instructions therefor, it is sufficient if, at the time of its execution, a testator comprehends that he is giving effect to his previously formed testamentary purpose, although he is now unable to follow the provisions of the will.⁷³ A testator should, however, have capacity to change any previously existing testamentary purpose, and it would seem insufficient that he have capacity only to know that he is executing a will formerly dictated without being able to recollect and approve the provisions made in distribution of his property.⁷⁴

Test Applied to Particular Will

While in a leading case the majority of the court held that the question in each case was whether the testator had sufficient capacity to make a will, and not whether he had capacity to make the

⁷⁰ *Smith v. Day*, 2 Pennewill (Del.) 245, 45 Atl. 396; *Duffield v. Robeson*, 2 Har. (Del.) 375; *Sutton v. Sutton*, 5 Har. (Del.) 459; *Lodge Will Case*, 2 Houst. (Del.) 418; *Jamison Will Case*, 3 Houst. (Del.) 108; *In re Hoover*, 19 D. C. (8 Mackey) 495; *Von de Veld v. Judy*, 143 Mo. 348, 44 S. W. 1117; *In re Buckman's Will*, 80 N. J. Eq. 556, 85 Atl. 246; *In re King's Will*, 29 Misc. Rep. 268, 61 N. Y. Supp. 238; *In re Hall's Will*, 5 Misc. Rep. 461, 24 N. Y. Supp. 864; *In re Dunham's Will*, 48 Hun, 618, 1 N. Y. Supp. 120; *In re Bull's Will*, 111 N. Y. 624, 19 N. E. 503; *Mitchell v. Kimbrough*, 98 Tenn. 535, 41 S. W. 993; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668.

⁷¹ *Mitchell v. Kimbrough*, 98 Tenn. 535, 41 S. W. 993.

⁷² *In re Journeay's Will*, 162 N. Y. 611, 57 N. E. 1113.

⁷³ *Perera v. Perera*, (1901) A. C. 354, 84 L. T. N. S. 371, 2 B. R. C. 33; *Parker v. Felgate*, (1883) 8 P. D. 171, where Sir James Hannen says: "If a person has given instructions to a solicitor to make a will, and the solicitor prepares it in accordance with those instructions, all that is necessary to make it a good will, if executed by the testator, is that he should be able to think thus far: 'I gave my solicitor instructions to prepare a will making a certain disposition of my property; I have no doubt that he has given effect to my intention, and I accept the document which is put before me as carrying it out.'"

⁷⁴ *Terry v. Davenport*, 170 Ind. 74, 83 N. E. 636; *In re Hoover* (1891)* 8 Mackey (19 D. C.) 495; *In re Coop*, 24 N. Y. St. Rep. 417, 6 N. Y. Supp. 664.

particular will in question,⁷⁵ yet this decision seems wrong on principle. The testator is required to be capable of understanding the nature and effect of the particular instrument, with reference to his property, the beneficiaries, and those having natural claims to his consideration. It seems clear that a testator might be able fully to comprehend the effect of a plain and simple will with regard to these particulars, when he might wholly fail to perceive the full bearing of a more complicated instrument. The better view is that testamentary capacity is to be determined with reference to the particular will, and not with regard to a general capacity to make any will whatever.⁷⁶ And there is no distinction in the degree of mental capacity requisite for the execution of a will of real estate and that required for the execution of a will of personal property.⁷⁷

CAPACITY TO DO BUSINESS AS A TEST

32. Capacity intelligently to transact ordinary business affairs includes capacity to make a will.

33. A testator may, however, be unable to transact ordinary business affairs, and still have testamentary capacity.

In endeavoring concretely to ascertain the presence of testamentary capacity as already defined, courts have often looked to capacity for doing various other things for purposes of comparison. It is clear that capacity to transact ordinary business involves an ability to bear in mind and consider those matters which a testator must be able to bear in mind and consider if he is to make a valid will. Such capacity is unquestionably greater than testamentary capacity. But the greater includes the less. Hence, if there is business capacity, usually there is also testamentary capacity,⁷⁸

⁷⁵ *Delafield v. Parish*, 25 N. Y. 10. The doctrine has been recently reiterated in New York. *Buchanan v. Belsey*, 65 App. Div. 58, 72 N. Y. Supp. 601. But see *Horn v. Pullman*, 72 N. Y. 269; *Van Guysling v. Van Kuren*, 35 N. Y. 70.

⁷⁶ *Drum v. Capps*, 240 Ill. 524, 88 N. E. 1020; *Campbell v. Campbell*, 130 Ill. 466, 22 N. E. 620, 6 L. R. A. 167; *Trish v. Newell*, 62 Ill. 196, 14 Am. Rep. 79.

⁷⁷ *Sloan v. Maxwell*, 3 N. J. Eq. 563, 566; *Winchester's Case*, 3 Co. 302.

⁷⁸ *ROWCLIFFE v. BELSON*, 261 Ill. 566, 104 N. E. 268, Ann. Cas. 1915A, 359, Dunmore Cas. Wills, 52; *Drum v. Capps*, 240 Ill. 524, 88 N. E. 1020; *Waugh v. Moan*, 200 Ill. 298, 65 N. E. 713; *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113; *Taylor v. Cox*, 153 Ill. 220, 38 N. E. 656; *Farmer v. Farmer*, 129 Mo. 530, 31 S. W. 926; *In re Metcalf's Will*, 16 Misc. Rep. 180, 38 N. Y. Supp. 1131; *In re Cox's Estate*, 167 Pa. 501, 31 Atl. 747; *In re Boyer's Estate*, 166 Pa. 630, 31 Atl. 359; *In re Green's Estate*, 140 Pa. 137, 21 Atl. 250; *In re Gatley's Estate*, 16 Pa. Co. Ct. R. 69; *In re Cameron's Estate*, 14 Pa. Co. Ct. R. 247; *Hill v. Fly* (Tenn. Ch. App.) 52 S. W. 731.

though the testator be sick, absent-minded, and feeble,⁷⁹ eccentric and excitable,⁸⁰ melancholy,⁸¹ stupid,⁸² morally abandoned,⁸³ illiterate and of failing memory,⁸⁴ extremely old,⁸⁵ childish.⁸⁶ But an insane delusion may so taint the will as to render it void, notwithstanding testator may have had capacity to do all kinds of business not involving such delusion.⁸⁷

However, a man may have entire testamentary capacity, and yet be incapable of attending to his ordinary business affairs.⁸⁸ Hence an instruction that if testator's mind and memory had, from any cause, become so impaired that he was, by reason thereof, at the time of executing the will, incapable of rationally transacting the ordinary business affairs of life with which he had formerly been familiar, he is said, in law, to have been of unsound mind and memory, is erroneous.⁸⁹

Contractual Capacity

Capacity to make contracts intelligently has frequently been used as a standard of comparison for the purpose of determining the existence of testamentary capacity. It is sometimes said that more capacity is required to make a will than a contract;⁹⁰ sometimes the same amount;⁹¹ sometimes less.⁹² The last is the much more common statement. Probably proof of contractual capacity is

⁷⁹ In re Voglesong's Estate, 196 Pa. 194, 46 Atl. 424; Bain v. Cline, 24 Or. 175, 33 Pac. 542.

⁸⁰ In re Skaats' Will, 74 Hun, 462, 26 N. Y. Supp. 494; Kettemann v. Metzger, 23 Ohio Cir. Ct. R. 61.

⁸¹ In re Lenhart's Estate, 199 Pa. 618, 49 Atl. 305.

⁸² In re Richardson's Will, 51 App. Div. 637, 64 N. Y. Supp. 944.

⁸³ In re Gorkow's Estate, 20 Wash. 563, 56 Pac. 385.

⁸⁴ Cutler v. Cutler, 103 Wis. 258, 79 N. W. 240.

⁸⁵ Entwistle v. Meikle, 180 Ill. 9, 54 N. E. 217.

⁸⁶ Riley v. Sherwood, 144 Mo. 354, 45 S. W. 1077.

⁸⁷ In re Segur's Will (1899) 71 Vt. 224, 44 Atl. 342.

⁸⁸ Kramer v. Wehnert, 81 Ala. 414, 1 South. 26; Appeal of Turner, 72 Conn. 305, 44 Atl. 310; Kellan v. Kellan, 258 Ill. 256, 101 N. E. 614; Ring v. Lawless, 190 Ill. 520, 60 N. E. 881; Sinnet v. Bowman, 151 Ill. 146, 37 N. E. 885; Petefish v. Becker, 176 Ill. 448, 52 N. E. 71; Perkins v. Perkins, 116 Iowa, 253, 90 N. W. 55; Meeker v. Meeker, 74 Iowa, 352, 37 N. W. 773, 7 Am. St. Rep. 489; Maddox v. Maddox, 114 Mo. 35, 21 S. W. 499, 35 Am. St. Rep. 734; Von de Veld v. Judy, 143 Mo. 348, 44 S. W. 1117; Crossan v. Crossan, 169 Mo. 631, 70 S. W. 136.

⁸⁹ Greene v. Greene, 145 Ill. 264, 33 N. E. 941, overruling Keithley v. Stafford, 126 Ill. 507, 18 N. E. 740.

⁹⁰ Boughton v. Knight, L. R. 3 P. & D. 64; Chandler v. Barrett, 21 La. Ann. 58, 99 Am. Dec. 701.

⁹¹ Coleman v. Robertson's Ex'rs, 17 Ala. 84.

⁹² In re Weedman's Estate, 254 Ill. 504, 98 N. E. 956; Perkins v. Perkins, 116 Iowa, 253, 90 N. W. 55; Meeker v. Meeker, 74 Iowa, 352, 37 N. W. 773,

prima facie evidence of testamentary capacity.⁹³ Where there is such divergence in the views of the courts, the standard of comparison is manifestly an unfortunate one. The difference of opinion is perhaps due not so much to an intrinsic dissimilarity between capacity to make a contract and capacity to make a will, rendering them unprofitable subjects of comparison,⁹⁴ as to the diverse views which have been taken as to the significance of contractual capacity when used for the purpose of this comparison. The contract of sale is commonly used in this connection. Now, if by "contractual capacity to make a sale" we are to understand a power on the part of the vendor to perceive the true significance of the subject-matter of the contract to himself, a just perception of its value, and an adequate comprehension of all the considerations bearing for and against the disposal of the property, no one could hesitate to say that it would require less capacity, ordinarily, to make a will, than a contract of sale.⁹⁵ If, on the other hand, we are to understand by "contractual capacity in a contract of sale" an understanding of the nature of the act (i. e., a knowledge on the part of the vendor that the title to the article is to pass from himself to the vendee in consideration of the payment by the latter of a certain amount), it is equally clear that ordinarily more capacity is required to make a will than a contract of sale.⁹⁶ By definitely explaining to the jury what they are to understand by "contractual capacity," as was done in *Boughton v. Knight*,⁹⁷ they might with advantage use this as a standard of comparison in determining the existence of testamentary capacity, while, with such explanation, confusion in the cases would substantially disappear.

Defining "criminal capacity" as an ability to distinguish between right and wrong, it is clear that it involves less mental power than

7 Am. St. Rep. 489; *Crowson v. Crowson*, 172 Mo. 691, 72 S. W. 1065; *West v. Knoppenberger*, 26 Ohio Cir. Ct. R. 168; *Converse's Ex'r v. Converse*, 21 Vt. 168, 52 Am. Dec. 58; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668.

It is sometimes said that it requires no greater mental capacity to dispose of one's property by will than by deed. *Schneider v. Manning*, 121 Ill. 376, 12 N. E. 267.

⁹³ In *re Wax's Estate*, 106 Cal. 343, 39 Pac. 624; *Entwistle v. Melkle*, 180 Ill. 9, 54 N. E. 217.

⁹⁴ Page, Wills, § 96.

⁹⁵ Such seems to be the view taken of contractual capacity by Judge Redfield when he says that less mind is commonly required to make a will than a contract of sale. *Converse's Ex'r v. Converse*, 21 Vt. 168, 52 Am. Dec. 58.

⁹⁶ Such is the view taken by Judge Hannen in *Boughton v. Knight*, L. R. 3 P. & D. 64, which results in the statement that more capacity is required to make a will than a contract.

⁹⁷ *Id.*

testamentary capacity.⁹⁸ The comparison is of little avail, however, and is rarely resorted to.

OLD AGE AND SICKNESS AS BEARING UPON TESTAMENTARY CAPACITY

34. Testamentary capacity may exist, though the testator be old, weak, and ill—even to the point of death—at the time of executing the will. His physical condition, however, is always significant in determining his mental condition.

Old age, weakness, either of body or mind, and illness—even to the point of death—are not inconsistent with testamentary capacity, though they may be considered as significant facts in determining its presence.⁹⁹ For absolutely sound and perfect mental faculties are not requisite for the making of a will.¹ So a testator may make a will, though his mind be so weakened that he is unable to take care of his estate.² Absent-mindedness and a tendency to brood over the memory of the dead do not show want of mental capacity.³ Neither does the impairment of memory.⁴ So the facts

⁹⁸ *Id.*

⁹⁹ *Henry v. Hall*, 106 Ala. 84, 17 South. 187, 54 Am. St. Rep. 22; *Hutchinson v. Hutchinson*, 152 Ill. 349, 38 N. E. 926, affirming 50 Ill. App. 87; *Pritchard v. Henderson*, 3 Pennewill (Del.) 128, 50 Atl. 217; *Holmberg v. Phillips* (Iowa) 78 N. W. 66; *Manatt v. Scott*, 106 Iowa, 203, 76 N. W. 717, 68 Am. St. Rep. 293; *Hall v. Perry*, 87 Me. 569, 33 Atl. 160, 47 Am. St. Rep. 352; *Little v. Little*, 83 Minn. 324, 86 N. W. 408; *Dieffenbach v. Grece*, 56 N. J. Eq. 365, 39 Atl. 536; *White v. Starr*, 47 N. J. Eq. 244, 20 Atl. 875; *In re Barber's Will* (N. J. Prerog.) 49 Atl. 826; *In re Carter's Will*, 60 N. J. Eq. 338, 51 Atl. 65; *In re Stewart's Will*, 59 Hun, 618, 13 N. Y. Supp. 219; *In re Mahoney's Will*, 58 Hun, 608, 12 N. Y. Supp. 122; *In re Murphy's Will*, 41 App. Div. 153, 58 N. Y. Supp. 450; *In re Voorhis' Will*, 54 Hun, 637, 7 N. Y. Supp. 596; *Skinner v. Lewis*, 40 Or. 571, 62 Pac. 523, 67 Pac. 951.

In Hathorn v. King, 8 Mass. 371, 5 Am. Dec. 106, instructions for the will were given by testatrix at eleven in the morning. She executed the will at six o'clock in the evening, and died at a quarter past eight the same evening.

In Collins v. Townley, 21 N. J. Eq. 353, the will of a testatrix ninety-eight years old was sustained, and in *Brower's Will*, 112 App. Div. 370, 98 N. Y. Supp. 438, the fact that testatrix was 96 years of age when will was executed was deemed insufficient to raise a presumption against her capacity.

¹ *Ring v. Lawless*, 190 Ill. 520, 60 N. E. 881; *Nieman v. Schnitker*, 181 Ill. 400, 55 N. E. 151; *Bice v. Hall*, 120 Ill. 597, 12 N. E. 236; *In re Voorhis' Will*, 56 Hun, 641, 9 N. Y. Supp. 201.

² *In re Johnson's Will*, 7 Misc. Rep. 220, 27 N. Y. Supp. 649.

³ *Ouachita Baptist College v. Scott*, 64 Ark. 349, 42 S. W. 536.

⁴ *Taylor v. Pegram*, 151 Ill. 106, 37 N. E. 837; *Prentis v. Bates*, 88 Mich. 567, 50 N. W. 637; *In re Carpenter's Will* (Sur.) 145 N. Y. Supp. 365; *Shrei-*

that the testator was suffering severely from the ravages of cancer,⁵ or from tumor on the brain,⁶ or from paralysis,⁷ or that he was subject to epileptic fits,⁸ or had softening of the brain,⁹ or locomotor ataxia,¹⁰ or had had a stroke of apoplexy, resulting in partial paralysis,¹¹ or that he was suffering great pain at the time of making the will,¹² or labored under extreme physical debility,¹³ so that he could only make his mark,¹⁴ and that not without assistance,¹⁵ do not of themselves destroy testamentary capacity. Any or all of these things will not incapacitate the testator, provided he has possession of his mental faculties sufficiently to fully appreciate and understand the will which he is about to make.¹⁶ But sickness may always be considered in determining testamentary capacity, and its effect may be such as to completely destroy it. Thus where the decedent had long suffered from an incurable disease, which his physician had ceased to treat because he could do nothing to arrest its progress, and on the day of signing the instrument he lay helpless on his bed, unable to carry on conversation or to comprehend questions put to him, the jury may properly find him to have been of unsound mind.¹⁷ If the sickness renders the decedent incapable of understanding in a reasonable degree the effect of the will upon his property and those entitled to receive it, it destroys testamentary capacity.¹⁸

ner v. Schreiner, 178 Pa. 57, 35 Atl. 974; *In re Douglass' Estate*, 162 Pa. 567, 29 Atl. 715; *Howard v. Howard* (1911) 112 Va. 566, 72 S. E. 133.

⁵ *Rarick v. Ulmer*, 144 Ind. 25, 42 N. E. 1099; *In re Gihon's Will*, 163 N. Y. 595, 57 N. E. 1110; *McFadin v. Catron*, 120 Mo. 252, 25 S. W. 506.

⁶ *In re Fricke*, 64 Hun, 639, 19 N. Y. Supp. 315.

⁷ *In re Cruger's Will*, 36 Misc. Rep. 477, 73 N. Y. Supp. 812; *In re Birdsall*, 2 Con. Sur. 433, 13 N. Y. Supp. 421; *Rothrock v. Rothrock*, 22 Or. 551, 30 Pac. 453.

⁸ *In re Flansburgh's Will*, 82 Hun, 49, 31 N. Y. Supp. 177; *In re Johnson's Will*, 7 Misc. Rep. 220, 27 N. Y. Supp. 649; *In re Rapplee*, 66 Hun, 558, 21 N. Y. Supp. 801.

⁹ *In re Silverthorn's Will*, 68 Wis. 372, 32 N. W. 287.

¹⁰ *In re Miller's Estate*, 179 Pa. 645, 36 Atl. 139, 39 L. R. A. 220.

¹¹ *Cheney v. Price*, 90 Hun, 238, 37 N. Y. Supp. 117.

¹² *Stevens v. Leonard*, 154 Ind. 67, 56 N. E. 27, 77 Am. St. Rep. 446.

¹³ *Stoutenburgh v. Hopkins*, 43 N. J. Eq. 577, 12 Atl. 689.

"Mere mental weakness, not due to mental disease, but solely to physical infirmity, does not constitute mental unsoundness." *McClain, J.*, in *Speer v. Speer* (1909) 146 Iowa, 6, 123 N. W. 176, 27 L. R. A. (N. S.) 294, 140 Am. St. Rep. 268.

¹⁴ *In re Patterson's Will*, 59 Hun, 624, 13 N. Y. Supp. 463, 26 Abb. N. C. 395.

¹⁵ *In re Dixon's Will*, 42 App. Div. 481, 59 N. Y. Supp. 421.

¹⁶ *Chrisman v. Chrisman*, 16 Or. 127, 18 Pac. 6.

¹⁷ *In re McCarthy*, 65 Hun, 624, 20 N. Y. Supp. 581. See, also, *In re Rounds' Will*, 25 Misc. Rep. 101, 54 N. Y. Supp. 710; *Mendenhall v. Tungate*, 95 Ky. 208, 24 S. W. 431.

¹⁸ *Hudson v. Hugan*, 56 Kan. 152, 42 Pac. 701.

Last Sickness

Wills are often made during the last sickness of the testator, and often when near the point of death. While the mental powers ordinarily fail with the approach of death, and the interval between execution and dissolution may undoubtedly be considered as bearing upon the question of testamentary capacity, yet such capacity may apparently exist even nearly up to the time of the death struggle.¹⁹ But it seems that a will cannot be made while in the death agony.²⁰

Old Age

If the testator has sufficient intelligence to understand the condition of his property, his relations to the natural objects of his bounty, and the nature and consequences of the act of executing his will, the will is valid, and lack of capacity to this end cannot be inferred from advanced age.²¹ But old age, coupled with defective memory, illness, and with a testamentary disposition different from that previously expressed as intended—it not affirmatively appearing that the decedent ever actually knew the contents of the instrument offered as his will—may be sufficient to defeat probate.²²

¹⁹ *In re Doolittle's Estate* (1908) 153 Cal. 29, 94 Pac. 240; *Gurley v. Park*, 135 Ind. 440, 35 N. E. 279; *Duggan v. McBreen*, 78 Iowa, 591, 43 N. W. 547; *Hathorn v. King*, 8 Mass. 371, 5 Am. Dec. 106; *In re Seagrist*, 11 Misc. Rep. 188, 32 N. Y. Supp. 1095; *In re McGraw's Will*, 9 App. Div. 372, 41 N. Y. Supp. 481; *McMaster v. Scriven*, 85 Wis. 162, 55 N. W. 149, 39 Am. St. Rep. 828.

²⁰ *In re Burrows' Estate*, 11 Ohio S. & O. P. Dec. 229, 8 Ohio N. P. 358.

²¹ *Dougherty v. McKagney* (1903) 139 Cal. 10, 72 Pac. 358; *Pooler v. Cristman*, 145 Ill. 405, 34 N. E. 57; *Smith v. James*, 72 Iowa, 515, 34 N. W. 309; *O'Connor v. Madison*, 98 Mich. 183, 57 N. W. 105; *Riggin v. Board*, 160 Mo. 570, 61 S. W. 803; *Norton v. Paxton*, 110 Mo. 456, 19 S. W. 807; *Clifton v. Clifton*, 47 N. J. Eq. 227, 21 Atl. 333; *Waddington v. Buzby*, 45 N. J. Eq. 173, 16 Atl. 690, 14 Am. St. Rep. 706; *In re Soule*, 22 Abb. N. C. 236, 3 N. Y. Supp. 259 (testator ninety-two years old); *In re Allison's Estate*, 58 Hun, 608, 12 N. Y. Supp. 324; *In re Stewart's Will*, 60 Hun, 586, 15 N. Y. Supp. 601; *In re Buchan's Will*, 16 Misc. Rep. 204, 38 N. Y. Supp. 1124; *In re Bartholick*, 1 Con. Sur. 373, 5 N. Y. Supp. 842; *In re Dixon's Will*, 42 App. Div. 481, 59 N. Y. Supp. 421; *In re Carver's Estate*, 3 Misc. Rep. 567, 23 N. Y. Supp. 753; *In re Snelling*, 136 N. Y. 515, 32 N. E. 1006; *In re Wheeler's Will*, 5 Misc. Rep. 279, 25 N. Y. Supp. 313; *In re Otis' Will*, 1 Misc. Rep. 258, 22 N. Y. Supp. 1060; *In re Henry's Will*, 18 Misc. Rep. 149, 41 N. Y. Supp. 1096; *In re Pike's Will*, 83 Hun, 327, 31 N. Y. Supp. 689; *In re Iredale's Will*, 53 App. Div. 45, 65 N. Y. Supp. 533; *In re Loeser's Estate*, 167 Pa. 498, 31 Atl. 732; *Appeal of Sharp*, 134 Pa. 492, 19 Atl. 679; *Appeal of Keating (Pa.)* 17 Atl. 207.

²² *In re Liddington's Will*, 51 Hun, 638, 4 N. Y. Supp. 646. See *In re Widmayer's Will*, 34 Misc. Rep. 439, 69 N. Y. Supp. 1014.

INSANITY AS AFFECTING TESTAMENTARY CAPACITY —INSANE DELUSIONS

35. An insane person, other than a monomaniac, is without testamentary capacity.
36. An insane person is one who is possessed by one or more insane delusions.
37. An insane delusion is a false belief for which there is no foundation in reason, and which would be incredible to the same person if of sound mind, and of which its victim cannot be dispossessed by either evidence or argument. It is a belief which no rational man, putting himself as nearly as may be in the situation of the insane person, can possibly conceive of himself as entertaining.

Lord Coke classified persons of unsound mind as idiots or natural born fools; those who, originally having sufficient capacity, have lost the same (i. e., lunatics); lunatics who enjoy lucid intervals; and drunkards. For our immediate purpose, we need only to distinguish between lunatics and idiots.

Idiots

No very exact definition of this term has been given, and perhaps none is needed. The distinction between a lunatic and an idiot or imbecile is clearly felt by every one. A lunatic is one whose faculties have become disordered. An idiot is one who either never had any faculties, or whose faculties have so decayed that they have ceased to exhibit activity to any serious degree. The dictionaries define an idiot as one who has been without understanding from his nativity.²³ But no doubt arrested development after birth, or injuries, particularly to the head, have often resulted in a condition identical, for legal purposes, with natural idiocy. It used to be said that an idiot is one who cannot number twenty, tell the days of the week, does not know his own father and mother, his own age, etc.²⁴ Doubtless a person who, with opportunities for learning these facts, does not acquire them, is an idiot, but an ability to do and tell these simple things would not convincingly prove that the person so capable was not still an idiot. A total lack of capacity for doing business even of the simplest kind characterizes most cases of idiocy. Wherever this power exists, it is safe to say that the testator is not

²³ Worcester's Dict.; Bouvler's Law Dict.

²⁴ 1 Hale, P. C. 29; Swinb. pt. 2, § 4.

an idiot,²⁵ though he may, of course, be still far from possessing testamentary capacity.

Lunatics

This term includes all persons of unsound mind who are not idiots or imbeciles. Lunacy indicates rather the derangement than the lack of faculties. Its symptoms are so various and so baffling that, for legal purposes, at least, they can hardly be described. But the most usual and striking characteristic is a decisive change in character, or a marked departure from the ordinary habits of thinking, feeling, and acting, without any adequate external cause. There is no fixed form of sanity, with which the person suspected is to be compared for the purpose of determining his mental condition. But, assuming him to have been originally of sound mind, he is to be compared with himself, and, if there are violent changes in the mental and moral make-up of the individual, as compared with his previous condition, of which no other adequate account can be given, they may fairly be attributed to a disorganization rather than a reorganization of the faculties; i. e., to insanity.²⁶ The following enumeration of symptoms is frequently quoted: "Extreme irritability, proneness to anger, suspicion, concealment, obstinacy, and perverseness are common. In regard to the affections, various abnormal impulses and inclinations are observed. Fondness or aversion to particular persons, without any special reason, a disposition to exercise cruelty, murderous desires, a wish to commit arson, or to steal, are observed. Memory is generally good in reference to things occurring during the disease, or as to persons with whom the patient was then connected, but defective or mistaken as to things which occurred previously. Of the intellectual faculties, not all are uniformly in an abnormal state. On the contrary, some faculties occasionally improve, thus producing a complex state of madness, on the one hand, and of wit, reflection, and shrewdness on the other. * * * There is often a disposition to soliloquize aloud, and to laugh without apparent reason."²⁷

But the decisive test as to the existence of insanity is the presence

²⁵ *Bannatyne v. Bannatyne*, 14 Eng. L. & Eq. 581, 590, 591.

²⁶ Taylor, Med. Jur. 629.

²⁷ Wharton & Stillé, §§ 106, 192, 195, 202.

But a mere revolution or change of character, in itself and without regard to the nature of the change, is not evidence of insanity. Hence it was held that the court properly refused to instruct that "if a man, after having attained mature life, undergoes a change of character and conduct, especially when connected with any derangement of the physical organism, it may induce a belief that it is the result of some morbid condition of the intellectual faculties"; such instruction being regarded as not sufficiently certain or specific. *Reichenbach v. Ruddach*, 127 Pa. 564, 18 Atl. 432.

of an insane delusion,²⁸ as defined above in the black-letter text—a definition which, with occasional variations in phrasing, is steadily adopted as correct.²⁹ A will made under the influence of a delusion of this character is invalid.³⁰

It is sometimes said that an insane delusion is a belief in facts which no rational person would have believed.³¹ This has been criticised as begging the question, or reasoning in a circle, inasmuch as it amounts to saying that a man is not rational who believes what no rational man would believe.³² Furthermore it has recently been said by a learned writer that the various definitions of insane delusion are of little practical value, since they all assume that every one knows what a sane man could or could not believe.³³ But it is evident that, as a practical guide to a jury, the definition last quoted, and others of similar import, are of much use. If the jurymen assumes, as he must and as he is justified in doing, that he is himself a rational man, he then can form an opinion as to what he, as a rational man, could believe. If, putting himself, with the help of the evidence, as nearly as may be in the place of the testator, he can say that he can conceive of himself as thinking or feeling as the testator felt or thought, he must then say that the testator was free from insane delusions. But if he cannot conceive of himself—a rational man—thinking or feeling after the manner of the testator, he must then say that the latter was insane. This is, in concrete form, the substance of the approved definitions; and their value to

²⁸ *Mill's Appeal*, 44 Conn. 484; *Waring v. Waring*, 6 Moore, P. O. 341.

²⁹ *Appeal of Kimberly*, 68 Conn. 428, 36 Atl. 847, 37 L. R. A. 261, 57 Am. St. Rep. 101 (from which the definition is taken); *Taylor v. McClintock* (1908) 87 Ark. 243, 112 S. W. 405; *In re Kendrick's Estate*, 130 Cal. 360, 62 Pac. 605; *Medill v. Snyder*, 61 Kan. 15, 58 Pac. 962, 78 Am. St. Rep. 307; *Haines v. Hayden*, 95 Mich. 332, 54 N. W. 911, 35 Am. St. Rep. 566; *Smith v. Smith*, 48 N. J. Eq. 566, 25 Atl. 11; *In re Hemingway's Estate*, 195 Pa. 291, 45 Atl. 726, 78 Am. St. Rep. 815; *In re Bennett's Estate*, 201 Pa. 485, 51 Atl. 336.

See, also, *Davenport v. Davenport*, 67 N. J. Eq. 320, 58 Atl. 535; *Boardman v. Woodman*, 47 N. H. 120; *Robinson v. Adams*, 62 Me. 401, 16 Am. Rep. 473; *Conner v. Skaggs*, 213 Mo. 334, 111 S. W. 1132; *In re White*, 121 N. Y. 406, 24 N. E. 935; *Dew v. Clark*, 3 Add. Eccl. 79.

³⁰ *In re Loewenstine's Will*, 2 Misc. Rep. 323, 21 N. Y. Supp. 931; *Johnson v. Cochrane*, 91 Hun, 165, 36 N. Y. Supp. 283; *In re Lockwood*, 2 Con. Sur. 118, 8 N. Y. Supp. 345.

³¹ Sir John Nicholl in *Dew v. Clark*, 3 Add. Eccl. 79, 89, followed in *Duffield v. Robeson*, 2 Har. (Del.) 375; *Louby v. Key*, 258 Ill. 558, 101 N. E. 946; *Orchardson v. Cofield*, 171 Ill. 14, 49 N. E. 197, 40 L. R. A. 256, 63 Am. St. Rep. 211.

³² *Boughton v. Knight*, L. R. 3 P. & D. 64. See, also, 1 Underhill, Wills, 120, note 1.

³³ Page, Wills, § 104.

the jury, in determining the mental condition of the testator, is obviously very great.⁸⁴

It is to be observed that even an apparently total loss of all moral sense, or what may be called moral insanity, will not defeat testamentary capacity. This is a question of intellectual rather than of moral capacity. Hence foul speech and licentiousness of disposition do not show legal inability to make a will.⁸⁵

ECCENTRICITY OR MISTAKE NOT INSANE DELUSIONS

38. Eccentricity, though proper to be considered as bearing thereon, does not of itself amount to insanity; neither is a mistake of fact, nor a belief, based upon false evidence, that a fact exists which does not exist, equivalent to an insane delusion.

Eccentricity or singularity must not be confounded with insanity. A testator may be eccentric, and yet do as he pleases with his property,⁸⁶ provided his mind is sound enough to meet the requirements of testamentary capacity heretofore discussed. Perverse opinions and unreasonable prejudices do not constitute mental alienation.⁸⁷ "No eccentricity or peculiarity of character or degree of moral depravity or unnatural feeling not amounting to destitution of reason or mental incompetency can be considered as insanity which will invalidate a will."⁸⁸ The question as to when the bounds of eccentricity are passed, and insanity commences, depends upon the peculiar circumstances of each case, and is to be judged from the whole character of the person whose capacity is in question, and

⁸⁴ See *Boughton v. Knight*, L. R. 3 P. & D. 64.

⁸⁵ *In re Jones*, 5 Misc. Rep. 199, 25 N. Y. Supp. 109; *Gorkow's Estate*, 20 Wash. 563, 56 Pac. 385.

⁸⁶ *Kinne v. Kinne*, 9 Conn. 102, 21 Am. Dec. 732; *Riddle v. Gibson*, 29 App. D. C. 237; *Schneider v. Manning*, 121 Ill. 376, 12 N. E. 267; *Bennett v. Hibbert*, 88 Iowa, 154, 55 N. W. 93; *Prentis v. Bates*, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494; *Reed v. McIntyre*, 86 Minn. 163, 90 N. W. 319; *Fulbright v. Perry County*, 145 Mo. 432, 46 S. W. 955; *Farnum v. Boyd*, 56 N. J. Eq. 766, 41 Atl. 422; *In re Wright's Estate*, 202 Pa. 395, 51 Atl. 1031; *In re Cardwell's Estate*, 10 Pa. Co. Ct. R. 318; *Pilkinton v. Gray*, 68 Law J. P. C. 63, [1899] App. Cas. 401.

⁸⁷ *American Seamen's Friend Soc. v. Hopper*, 33 N. Y. 619; *Lee's Heirs v. Lee's Ex'rs*, 4 McCord (S. C.) 183, 17 Am. Dec. 722; *Mercer v. Kelso's Adm'r*, 4 Grat. (Va.) 106.

⁸⁸ 1 *Clevinger's Medical Jurisprudence of Insanity*, 279, citing *Mullins v. Cottrell*, 41 Miss. 291; *Lee's Heirs v. Lee's Ex'rs*, 4 McCord (S. C.) 183, 17 Am. Dec. 722.

from his state and condition of mind, not only with respect to the immediate time in question, but at the intermediate stages of his life.³⁹

The point of view of the eccentric man can at least be perceived by, and is intelligible to, a normal individual. That of an insane person never is. The will of an eccentric testator is such as might have been anticipated by those familiar with his character and modes of thought. That of an insane person is often at variance with what might be expected from him in his normal condition.⁴⁰ Moreover, the eccentric person often realizes that his views are peculiar, and that the majority of men cannot be expected to acquiesce in them, but this is rarely the point of view of the insane person.⁴¹

A notable instance of what was regarded as mere eccentricity in a testator occurred in *Morgan v. Boys*,⁴² where a will directing that part of the testator's bowels should be made into fiddlestrings, and others sublimed into smelling salts, and the rest of his body vitrified into lenses, explaining that he had an aversion to funeral pomp, and wished his body to be made useful to mankind, was sustained. The same result was reached in the case of the will of an Englishman who had long lived in the East and who had adopted the habits and faith of the Mohammedans; the will providing for the erection of a cenotaph at Constantinople, with a light burning, and a description of the testator engraved thereon.⁴³

³⁹ Id.

⁴⁰ See 1 Redf. Wills, 85.

⁴¹ For fuller elaboration of this matter, see 1 Underhill, Wills, § 92.

⁴² Cited in Taylor, Med. Jur. (2d Am. Ed.) 555.

Despite the fact that the testator was shown to have conducted his affairs with great shrewdness and ability, and had always been regarded by his associates as a person of indisputable capacity, both Judge Redfield and Professor Schouler criticised the decision on the ground that the heartless and irreverent disregard of his person indicates a state of mental aberration. 1 Redf. Wills, 83, note; Schoul. Wills, § 150, and note. But in view of the exceedingly scant regard which nature shows to the persons of the dead, one may, perhaps, be pardoned for sympathizing somewhat with the testator's indifference in this instance. The consideration shown to the dead body, and more particularly the efforts made to prevent its dissolution, savor more of savagery than of enlightenment. One of the learned writers above referred to suggests that a will directing cremation need be no more than eccentric. One may be allowed to doubt if it be even that.

Where an unmarried testatrix kept fourteen dogs of both sexes in kennels in her drawing room, her will was disallowed on the ground of insanity (*Yglesias v. Dyke*, Prerog. Court, May, 1852; Taylor, Med. Jur. 658); and the same result was reached in the will of a testatrix who kept many cats, which were provided with regular meals, and furnished with plates and napkins.

⁴³ *Austen v. Graham*, 8 Moore, P. C. 193.

Mistake

False beliefs entertained by a testator in consequence of some mistake, and influencing the disposition of his property, do not amount to insane delusions, unless they are wholly groundless and unsupported by any evidence. In other words, to amount to insane delusions, they must be beliefs such as no rational man, putting himself in the place of the testator, either would or could entertain; and this can be said of no belief that connects itself with any fact, however flimsy the connection may be.⁴⁴ Thus, where a father disinherited his children, who had testified against him in a divorce suit, because he thought that they sympathized with their mother, had testified falsely, and were trying to rob him, no insane delusion can be said to exist;⁴⁵ nor where a child was disinherited by reason of rumors that he was not the testator's child;⁴⁶ nor where a sincere believer in Christian Science left her home, and gave the bulk of her property to a church of that belief, because of a conviction that her sisters, who were strongly opposed to her belief, were persecuting her therefor;⁴⁷ nor where the testatrix believed that her sister had attempted her life in consequence of being told that she had administered to her a double dose of morphine, and had remarked that it did the testatrix no harm.⁴⁸

⁴⁴ Many cases substantially illustrate this proposition. See *In re Ruffino's Estate*, 116 Cal. 304, 48 Pac. 127; *Carpenter v. Bailey*, 94 Cal. 406, 29 Pac. 1101; *Appeal of Kimberly*, 68 Conn. 428, 36 Atl. 847, 37 L. R. A. 261, 57 Am. St. Rep. 101; *Snell v. Weldon*, 243 Ill. 496, 90 N. E. 1061; *Maynard v. Tyler*, 168 Mass. 107, 46 N. E. 413; *Middleditch v. Williams*, 45 N. J. Eq. 726, 17 Atl. 826, 4 L. R. A. 738; *Phillips v. Flagler*, 82 Misc. Rep. 500, 143 N. Y. Supp. 798; *Buchanan v. Belsey*, 65 App. Div. 58, 72 N. Y. Supp. 601; *In re Lang's Will*, 9 Misc. Rep. 521, 30 N. Y. Supp. 388; *In re O'Dea's Will*, 84 Hun, 591, 33 N. Y. Supp. 463; *POTTER v. JONES*, 20 Or. 239, 25 Pac. 769, 12 L. R. A. 161, *Dunmore Cas. Wills*, 54; *Skinner v. Lewis*, 40 Or. 571, 62 Pac. 523, 67 Pac. 951; *In re Hemingway's Estate*, 7 North. Co. R. (Pa.) 93; *Martin v. Thayer*, 37 W. Va. 38, 16 S. E. 489.

⁴⁵ *Bain v. Cline*, 24 Or. 175, 33 Pac. 542. Very likely there was a delusion here, but it obviously was not an insane one.

⁴⁶ *In re Smith's Will (Sur.)* 24 N. Y. Supp. 928.

⁴⁷ *In re Brush's Will*, 35 Misc. Rep. 689, 72 N. Y. Supp. 421.

⁴⁸ *In re Kendrick's Estate*, 130 Cal. 360, 62 Pac. 605. See, also, *Davenport v. Davenport*, 67 N. J. Eq. 320, 58 Atl. 535; *Hall v. Perry*, 87 Me. 569, 33 Atl. 160, 47 Am. St. Rep. 352.

JEALOUSY AND PREJUDICE NOT INSANE DELUSIONS

39. Neither jealousy, if it has the slightest apparent foundation in fact, nor personal dislike nor prejudice, though wholly without foundation, amount to insane delusion.

Jealousy

The same principle controls here as in the case of mistake. In the absence of rumors and of all evidence of the wife's infidelity, a belief therein by the testator, in the teeth of all argument to the contrary, would be an insane belief; ⁴⁹ otherwise not.

Prejudice

With dislike and prejudice, it is somewhat different. While these feelings may generally have what is at least conceived to be a solid foundation in fact, yet they are oftentimes instinctive. In either case, they do not, of themselves, destroy testamentary capacity.⁵⁰ Thus a violent dislike of one's daughter-in-law, and an indisposition to receive her advances towards a reconciliation, are not proof of insanity.⁵¹ Neither is a marked change in feelings towards a relative, resulting in fear and antipathy;⁵² nor dislike of a brother, resulting in his being disinherited, based upon an unjust belief that he had obtained more than his share of their father's estate;⁵³ nor offense at a son because he sided with a neighbor in a dispute over a boundary line, and joined the Masons, of whom the testator thought ill.⁵⁴ But a wholly groundless hatred of a near relative, such as a child, towards whom a normal person would entertain feelings of kindness and regard in the absence of strong reasons for feeling otherwise, is evidence of testamentary incapacity.⁵⁵

⁴⁹ *Burkhart v. Gladish*, 123 Ind. 337, 24 N. E. 118; *In re Smith's Will* (Sur.) 24 N. Y. Supp. 928.

⁵⁰ *Carter v. Dixon*, 69 Ga. 82; *Drum v. Capps*, 240 Ill. 524, 88 N. E. 1020; *Gordon v. Morrow* (Ky.) 10 S. W. 373; *In re Oberdorf's Estate*, 2 Lack. Leg. N. (Pa.) 43; *Brown v. Ward*, 53 Md. 376, 392, 36 Am. Rep. 422; *In re Clapham's Estate*, 73 Neb. 492, 103 N. W. 61; *Clapp v. Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681.

⁵¹ *In re Spencer*, 96 Cal. 448, 31 Pac. 453.

⁵² *In re McGovran's Estate*, 185 Pa. 203, 39 Atl. 816.

⁵³ *Bull v. Wheeler*, 6 Dem. Sur. (N. Y.) 123.

⁵⁴ *In re White*, 121 N. Y. 406, 24 N. E. 935.

⁵⁵ *In re Kahn*, 1 Con. Sur. 510, 5 N. Y. Supp. 556; *Merrill v. Rolston*, 5 Redf. Sur. (N. Y.) 220. See, also, *RIVARD v. RIVARD*, 109 Mich. 98, 66 N. W. 681, 63 Am. St. Rep. 566, *Dunmore Cas. Wills*, 58.

MONOMANIA AS AFFECTING TESTAMENTARY CAPACITY

40. Monomania is that species of insanity in which the delusion is confined to a single object, or a limited number of objects, and which does not result in the complete mental disorganization of its victim.
41. A monomaniac, who can meet the test for testamentary capacity hereinbefore stated, may make a valid will, provided that the insane delusion does not influence the disposition of property therein contained.

The doctrine was, at one time, maintained in England that the human mind was indivisible; that the expression "partial insanity" was an incorrect phrase; that a mind which is actually unsound at all times upon one subject cannot be deemed sound on other subjects; and that a will made by a person having such a mind, though apparently rational and proper, and though the infirmity had no bearing upon the testamentary disposition, and was only discoverable when the mind was addressed to certain subjects to the exclusion of all others, was invalid.⁵⁶ But this view was in conflict with the earlier decisions,⁵⁷ and has since been in terms rejected in England,⁵⁸ and it never gained recognition in the United States, where the rule as stated in the black-letter text has been steadily followed.⁵⁹ And the rule is now substantially universal that the theory of medical science that there is no such thing as partial insanity, and that a man is either sane or insane, is not true in law. Within this rule, partial insanity or monomania invalidates a will which is its direct offspring, or where the will was in any way the effect of

⁵⁶ Lord Brougham, in *Waring v. Waring*, 6 Moore, P. C. 341, 12 Jur. 947.

⁵⁷ *Dew v. Clark*, 1 Add. Eccl. 279, 3 Add. Eccl. 79.

⁵⁸ *Banks v. Goodfellow*, 22 L. T. N. S. 841, L. R. 5 Q. B. 549, holding that delusions arising from mental disease, which are not calculated to prevent the exercise of those faculties essential to the making of a will, nor to interfere with the consideration of the matter which should be weighed on such an occasion, and which have not in fact influenced the testamentary disposition in question, are not sufficient to deprive the testator of testamentary capacity. See Schoul. Wills, § 156.

⁵⁹ *Dunham's Appeal*, 27 Conn. 192; *James v. Langdon*, 7 B. Mon. (Ky.) 193; *Brown v. Ward*, 53 Md. 376, 36 Am. Rep. 442; *Whitney v. Twombly*, 136 Mass. 145; *Rice v. Rice*, 50 Mich. 448, 15 N. W. 545; *Hamon v. Hamon*, 180 Mo. 685, 79 S. W. 422; *Hollinger v. Syms*, 37 N. J. Eq. 221; *Clapp v. Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681; *Gass' Heirs v. Gass' Ex'rs*, 3 Humph. (Tenn.) 278; *Cole's Will*, 49 Wis. 179, 5 N. W. 346.

or the result of such insanity, though the testator's general capacity was unimpeached.⁶⁰

Will Invalid if Delusion Affects It

The will of a monomaniac is as void as that of a person generally insane, if the insane delusion operates to affect its provisions; otherwise, the fact that insane delusions exist is of no consequence.⁶¹

⁶⁰ 1 Clevenger, Med. Juris. of Insanity, 293. In view of the notorious unsteadiness of a good deal of so-called medical science, and the comparative infancy of physiological psychology, lawyers may be forgiven if they are in no haste to modify well-settled legal formulas, which have been proved by experience to be of much value, and which are based on practical observation and good sense, to meet the view that the mind is a unit. Indeed, assuming the truth of the theory, which intrinsically seems plausible, it is doubtful if these formulas need much modification. For the mind may be a unit, and yet be incapable of operating correctly along certain lines. It may be an unsound unit for certain purposes, and sound enough for certain others. A mental unit may go far astray in dealing with the subject of witches, and yet be very wise, that topic out of mind, in making a testamentary disposition of property. Just as the unit the stomach may be sound enough in dealing with certain kinds of food, and very unreliable in its relation to others, so with the unit the mind. Is the stomach sound? For some purposes, yes; for others, no.

⁶¹ Taylor v. McClintock (1908) 87 Ark. 243, 112 S. W. 405, citing Gardner on Wills, 120; In re Kendrick's Estate, 130 Cal. 360, 62 Pac. 605 (holding that an instruction that if the testatrix, at the time of her death, was under the belief that her sister had tried to kill her, and that there was no foundation for such belief, and that she was incapable of being reasoned out of it, she was laboring under an insane delusion, was erroneous, in not stating that the will must be caused by the insane delusion); In re Redfield's Estate, 116 Cal. 637, 48 Pac. 794; In re Miller's Will, 3 Boyce (Del.) 477, 85 Atl. 803; Lucas v. Parsons, 24 Ga. 640, 71 Am. Dec. 147; Orchardson v. Cofield, 171 Ill. 14, 49 N. E. 197, 40 L. R. A. 256, 63 Am. St. Rep. 211; Brace v. Black, 125 Ill. 33, 17 N. E. 66; Durham v. Smith, 120 Ind. 463, 22 N. E. 333; Young v. Miller, 145 Ind. 652, 44 N. E. 757; Blough v. Parry, 144 Ind. 463, 40 N. E. 70, 43 N. E. 560 (holding that a statute enumerating monomaniacs among persons of unsound mind does not necessarily incapacitate a monomaniac from making a will); Johnson v. Johnson, 105 Md. 81, 65 Atl. 918, 121 Am. St. Rep. 570; RIVARD v. RIVARD, 109 Mich. 98, 66 N. W. 681, 63 Am. St. Rep. 566, Dunmore Cas. Wills, 58; Holton v. Cochran, 208 Mo. 314, 106 S. W. 1035; Gilman v. Ayer, 63 N. J. Eq. 806, 52 Atl. 1131, affirming (N. J. Prerog.) 47 Atl. 1049; Peninsular Trust Co. v. Barker, 116 Mich. 333, 74 N. W. 508; Middleditch v. Williams, 45 N. J. Eq. 726, 17 Atl. 826, 4 L. R. A. 738; In re Iredale's Will, 53 App. Div. 45, 65 N. Y. Supp. 533; In re Gannon's Will, 2 Misc. Rep. 329, 21 N. Y. Supp. 960; In re Fricke, 64 Hun, 639, 19 N. Y. Supp. 315; General Convention of New Jerusalem Church v. Crocker, 7 Ohio Cir. Ct. R. 327; Potter v. Jones, 20 Or. 239, 25 Pac. 769, 12 L. R. A. 161; Englert v. Englert, 198 Pa. 326, 47 Atl. 940, 82 Am. St. Rep. 808; In re Hemingway's Estate, 195 Pa. 291, 45 Atl. 726, 78 Am. St. Rep. 815; Thomas v. Carter, 170 Pa. 272, 33 Atl. 81, 50 Am. St. Rep. 770; In re Trich's Ex'r v. Trich, 165 Pa. 586, 30 Alt.

A testator may, however, be the subject of a partial derangement in his attitude toward a certain individual and this derangement may be the cause of depriving such individual of the testator's bounty, which he otherwise would have enjoyed, and yet the will may be valid.⁶²

PECULIAR RELIGIOUS BELIEFS NOT INSANE DELUSIONS

42. A belief in spiritualism, Christian Science, or any other unusual religious doctrine, or a belief in witchcraft, is not proof of insanity, and does not render a testator incapable of making a will, unless his mind is so controlled by his peculiar views as to prevent the exercise of a rational judgment relative to the disposition of his property.

The cases are in accord that a belief in spiritualism does not, of itself, constitute insanity.⁶³ But whether, if this belief operates to determine the character of the will, it is to be regarded as an insane

1053; *In re Segur's Will*, 71 Vt. 224, 44 Atl. 342; *Manley's Ex'r v. Staples*, 65 Vt. 370, 26 Atl. 630.

⁶² "Instance the case of an individual having two sons, his only heirs at law, and a nephew, to whom he is under peculiar moral obligations to leave a liberal portion of his estate. He acknowledges his obligation, and intends that his nephew shall be an object of his bounty, and shall share with his legal heirs his whole property. He suddenly conceives the notion that this nephew has become a king, or an inheritor of immense wealth, and under this vain delusion he makes his will leaving his whole estate to his sons, to one of them two-thirds, and the remaining third to the other, the portion between the sons being in no wise affected or having no connection with the delusion toward the nephew. Can the validity of such a will be questioned: Cui bono? Not by the nephew. The delusion, it is true, has lost to him a valuable estate; but the interposition of a court, by refusing probate to the will, cannot make him an heir at law or a participator in the inheritance. Nor can the son who takes the lesser portion of the estate impeach the will, for the delusion in no way affected the disposition made to him." *Stackhouse v. Horton*, 15 N. J. Eq. 202 and 225.

⁶³ *In re Spencer*, 96 Cal. 448, 31 Pac. 453; *Whipple v. Eddy*, 161 Ill. 114, 43 N. E. 789; *Steinkuehler v. Wempner* (1907) 169 Ind. 154, 81 N. E. 482, 15 L. R. A. (N. S.) 673; *Raison v. Raison*, 148 Ky. 116, 146 S. W. 400; *McClary v. Stull*, 44 Neb. 175, 62 N. W. 501; *Middleditch v. Williams*, 45 N. J. Eq. 726, 17 Atl. 826, 4 L. R. A. 738; *Keeler v. Keeler*, 51 Hun, 636, 3 N. Y. Supp. 629; *Buchanan v. Pierle* (1903) 205 Pa. 123, 54 Atl. 583, 97 Am. St. Rep. 725; *In re Siebs' Estate*, 70 Wash. 374, 126 Pac. 912, Ann. Cas. 1913E, 125.

A believer in Spiritualism may think so persistently on the subject as to become a monomaniac, incapable of reasoning when this subject is concerned, and a will made in consequence of such monomania is void. *O'Dell v. Goff*, 149 Mich. 152, 112 N. W. 736, 10 L. R. A. (N. S.) 989, 119 Am. St. Rep. 662.

delusion is not so clear. The language of the cases usually is that to avoid a will on this ground it must be shown to be the offspring of the belief,⁶⁴ or that delusion is the result thereof.⁶⁵ The true rule, it is submitted, is that while a will is not necessarily invalid, although influenced by a belief in spiritualism, yet if this belief gives rise to delusions which no rational man, putting himself in the place of the believer and accepting his general belief in spiritualism, could conceive of himself as entertaining, and such delusions influence the character of the will, then the instrument is void as being the product of an insane delusion.⁶⁶

The same principles apparently control in the case of belief in Christian Science,⁶⁷ Swedenborgianism,⁶⁸ or any other peculiar religious belief.⁶⁹

Belief in Witchcraft

A belief in witchcraft does not, of itself, render one incapable of making a will.⁷⁰ Since such a belief is to-day so much less common than formerly, it might reasonably have been treated as an insane delusion. In cases involving a belief in witchcraft, however, the courts have usually applied the same principles as those above stated as controlling in the case of a testator holding a peculiar religious belief.⁷¹

Other Instances of Insane Delusions

Where a testator believed that he was a son of George IV, addressed a memorial on that subject to Queen Victoria, and by will

⁶⁴ In re Randall, 99 Me. 396, 59 Atl. 552; In re Rohe's Will, 22 Misc. Rep. 415, 50 N. Y. Supp. 392; Keeler v. Keeler, 51 Hun, 636, 3 N. Y. Supp. 629; Buchanan v. Pierie, 205 Pa. 123, 54 Atl. 583, 97 Am. St. Rep. 725; Ingersoll v. Gourley, 78 Wash. 406, 139 Pac. 207, Ann. Cas. 1915D, 570.

The mere fact that testator, an ardent spiritualist, bequeathed a large part of his property for a spiritualist church, does not show testamentary incapacity. Crumbaugh v. Owen, 238 Ill. 497, 87 N. E. 312.

⁶⁵ In re Halbert's Will, 15 Misc. Rep. 308, 37 N. Y. Supp. 757.

⁶⁶ See Orchardson v. Cofield, 171 Ill. 14, 49 N. E. 197, 40 L. R. A. 256, 63 Am. St. Rep. 211; In re Smith's Will, 52 Wis. 543, 8 N. W. 616, 9 N. W. 665, 38 Am. Rep. 756; In re McIlroy's Estate, 10 Pa. Dist. R. 78.

⁶⁷ In re Brush's Will, 35 Misc. Rep. 689, 72 N. Y. Supp. 421, where bulk of estate left to Christian Science church.

⁶⁸ Scott v. Scott, 212 Ill. 597, 72 N. E. 708.

⁶⁹ Williams v. Williams (Ky.) 23 S. W. 789; Williams' Ex'r v. Williams, 90 Ky. 28, 13 S. W. 250; Taylor v. Trich, 165 Pa. 586, 30 Atl. 1053, 44 Am. St. Rep. 679; Gass' Heirs v. Gass' Ex'rs, 3 Humph. (Tenn.) 278.

⁷⁰ Carnahan v. Hamilton, 265 Ill. 508, 107 N. E. 210; Addington v. Wilson, 5 Ind. 137, 61 Am. Dec. 81; In re Vedder, 6 Dem. Sur. (N. Y.) 92.

⁷¹ Kelly v. Miller, 39 Miss. 17; Fulbright v. Perry County, 145 Mo. 432, 46 S. W. 955; Lee's Heirs v. Lee's Ex'rs, 4 McCord (S. C.) 183, 17 Am. Dec. 722.

A general belief in the exercise of supernatural powers by others does not

left his property to his wife for life, remainder to be used to found a free public library for the use of the people of Brighton, a town in which the testator's imaginary ancestor had taken much interest, the will was regarded as invalid.⁷²

Another striking case was that of *Smith v. Tebbett*.⁷³ Here the testatrix believed herself to be the Holy Ghost, one Simms Smith being the Father. She believed that epidemic diseases came through her agency. "God said, 'Turn on the screw,' and the cholera came. 'Turn it again,' and it ceased." Inasmuch as there were clear traces of submission to the will of the beneficiary, Smith, resulting from her belief as to his character and her relation to him as a part of the Godhead, the will was pronounced invalid.

When a father, under the influence of a mental disorder, formed a strong antipathy to his oldest son, which he retained after otherwise recovering his reason, and which resulted in the son's being disinherited, the will was set aside as the product of an insane delusion.⁷⁴ The same result was reached when a husband was groundlessly jealous of his wife, a pure woman, denied the paternity of his own children, and maltreated her because of her imaginary unfaithfulness.⁷⁵ Instances might be multiplied, but their multiplication would shed no further light on the controlling principles which have already been stated and which govern in every case.

SENILE DEMENTIA

43. Senile dementia is a form of insanity peculiar to aged people, marked by a decay of the mental faculties, whereby the person is reduced to second childhood, and in consequence of which testamentary capacity disappears.

justify the assumption that the testator was insane. *Schildnecht v. Rompf's Ex'x* (Ky.) 4 S. W. 235. Neither does a belief in metempsychosis. *In re Bonard's Will* (N. Y.) 16 Abb. Prac. (N. S.) 128.

⁷² *Smee v. Smee*, L. R. 5 P. D. 84. The testator also labored under a delusion that he had been defrauded by his brother.

⁷³ L. R. 1 P. & D. 398.

⁷⁴ *Lucas v. Parsons*, 24 Ga. 640, 71 Am. Dec. 147. See, also, *Miller v. White*, 5 Redf. Sur. (N. Y.) 320.

The same conclusion was reached where the testator was under the delusion that his nephews, who were his heirs, were conspiring to take his life, and that one of them had caused his death by placing him upon the stove. *American Seamen's Friend Soc. v. Hopper*, 33 N. Y. 619.

⁷⁵ *Burkhart v. Gladish*, 123 Ind. 338, 24 N. E. 118.

A belief that the testator's body will last to the end of time is an insane delusion, which, if it operates to affect the will, renders the instrument void. *In re Sammon's Will*, 4 Dem. Sur. (N. Y.) 507.

As has already been seen, old age is not inconsistent with testamentary capacity.⁷⁶ But, as a general thing, the mental powers decline with advancing years, and when the insanity characteristic of and peculiar to old age appears—and this is what is meant by senile dementia⁷⁷—testamentary capacity can no longer exist. The great difficulty in such cases is to determine whether the testator, in view of his declining powers, has passed the shadowy but none the less existent border line which distinguishes the sane from the insane. The universal test applies here as elsewhere—the capacity to bear in mind his property, the claimants on his bounty, and the effect of the testamentary act. If this exists, he may make a will,⁷⁸ but this capacity cannot be coexistent with senile dementia.

Forgetfulness, morbid irritability, disregard of the proprieties of life, filthiness of speech and person, profound moral deterioration, suspicions regarding the security of property, failure of powers of attention, and illusions are among the more common symptoms either of the presence or approach of the malady.⁷⁹

WILL MADE IN A LUCID INTERVAL

44. Though a testator be chronically insane, a will made by him during a lucid interval is valid.

45. A lucid interval occurs when the patient is sufficiently restored to his normal condition to enable him to act with such an amount of reason, memory, and judgment as to make his act legal and operative.

Although, in the case of chronic insanity, the establishment of the existence of a lucid interval is exceedingly difficult, and, although certain medical authorities have doubted its existence,⁸⁰ yet for testamentary and other legal purposes such a condition undoubtedly exists, and if, during such an interval, the patient can meet the requirements of testamentary capacity as heretofore stated, his will

⁷⁶ Ante, p. 96.

⁷⁷ 2 Clevenger's Med. Juris. of Insanity, 910. See, also, *Graham v. Deuter-*
man, 244 Ill. 124, 91 N. E. 61.

⁷⁸ *Huffaker v. Beers* (1910) 95 Ark. 158, 128 S. W. 1040; *Gates v. Cole* (1908) 137 Iowa, 613, 115 N. W. 236; *Bever v. Spangler*, 93 Iowa, 576, 61 N. W. 1072; *Davis v. Denny*, 94 Md. 390, 50 Atl. 1037.

⁷⁹ 2 Clevenger's Med. Juris. of Insanity, 912 et seq. See, also, *Byrne v. Fulkerson*, 254 Mo. 97, 162 S. W. 171.

⁸⁰ See *Hammond on Insanity in Its Medico-Legal Relations*; 1 Clevenger's Medical Jurisprudence of Insanity, 66 et seq.

is valid;⁸¹ otherwise not, even though all symptoms of insanity have wholly disappeared.⁸²

It has been regarded by some writers as important to distinguish between a remission of the disease and a genuine lucid interval,⁸³ but it is doubtful if the distinction is either clear or of much value.⁸⁴ Assuming that a lucid interval implies a complete restoration to sanity, while a remission implies a mere abatement of symptoms, the difference is clear enough. But a lucid interval involves no such implication; indeed complete sanity is not essential to the capacity to make a will, and, if there is a complete abatement of all indications of insanity for some significant period of time, this is strong evidence to show that for the time being the patient's mental condition sufficiently approximates his normal condition to enable him to make a will, if, in his normal condition, he had testamentary capacity. It has been said that organic disease may exist without producing its usual symptoms, and that an epileptic is none the less such during his freedom from attacks.⁸⁵ Still an epileptic might well make a will, when not under the influence of a paroxysm.⁸⁶ "By a perfect interval, I do not mean a cooler moment, an abatement of pain or violence, or of a higher state of torture, a mind relieved from excessive pressure, but an interval in which the mind, having thrown off the disease, had recovered its general habit."⁸⁷ This language, if interpreted as meaning that there must be not merely a cessation of the violent symptoms of the disorder, but a restoration of the faculties of the mind sufficient to enable the party soundly to judge of the act,⁸⁸ states the law in this connection with sufficient exactness.

⁸¹ *In re Weir's Will*, 9 Dana (Ky.) 434; *Succession of Bey*, 46 La. Ann. 773, 15 South. 297, 24 L. R. A. 577; *Chandler v. Barrett*, 21 La. Ann. 58, 99 Am. Dec. 701; *In re Ayers' Estate*, 84 Neb. 16, 120 N. W. 491, where testator repeatedly committed to hospital for insane before and after execution of will; *Goble v. Grant*, 3 N. J. Eq. 629; *In re Evans' Will*, 37 Misc. Rep. 337, 75 N. Y. Supp. 491; *In re McPherson's Will* (Sur.) 4 N. Y. Supp. 181; *Manley's Ex'r v. Staples*, 65 Vt. 370, 26 Atl. 630.

All questions relating to evidence and burden of proof, in this connection, will be discussed in a subsequent chapter.

⁸² *White v. Wilson*, 13 Ves. 88; *In re Miller's Will*, 8 Boyce (Del.) 477, 85 Atl. 803.

⁸³ *Taylor*, Med. Juris. 651; 1 Underhill, Wills, § 97.

⁸⁴ 1 Redf. Wills, 100.

⁸⁵ 1 Clevenger's Med. Jur. of Insanity, 66.

⁸⁶ See ante, p. 95.

⁸⁷ *Lord Thurlow in Atty. Gen. v. Parnther*, 3 Bro. Ch. 441.

⁸⁸ See *Sir William Grant in Hall v. Warren*, 9 Ves. 611. See, also, *Jenckes v. Probate Court*, 2 R. I. 255; *Boyd v. Eby*, 8 Watts (Pa.) 68.

Probably the most extreme case in which a lucid interval was regarded as existing is that of *Cartwright v. Cartwright*, 1 Phillim. 90, where the will of

GUARDIANSHIP AS AFFECTING TESTAMENTARY CAPACITY

46. While one under guardianship for insanity is, prima facie, incapable of making a will, yet the appointment of a guardian for an alleged insane person does not conclusively show lack of testamentary capacity.

The rule, as above stated, is uniformly recognized.⁸⁹ While the appointment of a guardian for a party because of chronic insanity (and because of no other species of insanity would a guardian ordinarily be appointed) is prima facie evidence of subsequent incapacity,⁹⁰ in view of the fact that a condition thus shown to exist is presumed to continue, yet if testamentary capacity be shown, either by reason of a lucid interval or through complete restoration to a normal condition, the will is valid, although the guardianship may not have been determined by decree of court.⁹¹

The appointment of a guardian because of an adjudication that one is mentally incapable of taking care of his property does not necessarily render the subject of the adjudication incapable of making a will.⁹²

a testatrix who was violently insane, and whose hands had been untied for the purpose of permitting her to write, and who walked wildly about the room and tore up several pieces of paper before finally preparing the final draft, was admitted to probate, being regarded, in view of all the circumstances and the rational character of the will, as made during a lucid interval. Despite some strictures on this case (see 1 Clevenger's Med. Jur. of Insanity), no lawyer can read it without being strongly impressed with its substantial soundness, from a legal standpoint.

⁸⁹ In re Johnson's Estate, 57 Cal. 529; Lucas v. Parsons, 27 Ga. 593; Harrison v. Bishop, 131 Ind. 161, 30 N. E. 1069, 31 Am. St. Rep. 422; Linkmeyer v. Brandt, 107 Iowa, 750, 77 N. W. 493; In re Fenton's Will, 97 Iowa, 192, 66 N. W. 99; IN RE AMERICAN BOARD OF COM'RS FOR FOREIGN MISSIONS (1906) 102 Me. 72, 66 Atl. 215, Dunmore Cas. Wills, 60; Breed v. Pratt, 18 Pick. (Mass.) 115; Rice v. Rice, 50 Mich. 448, 15 N. W. 545; May v. Bradley, 127 Mass. 414, 422; Brady v. McBride, 39 N. J. Eq. 495; In re Pendleton, 1 Con. Sur. 480, 5 N. Y. Supp. 849; Williams v. Robinson, 39 Vt. 267; In re Slinger's Will, 72 Wis. 22, 37 N. W. 236; Roe v. Nix, 62 L. J. P. 36.

⁹⁰ In re Fenton's Will, 97 Iowa, 192, 66 N. W. 99. For full discussion of this matter, see post, p. 124.

⁹¹ See cases cited in note 89. The record of the appointment of a guardian two years after the will was executed is not competent evidence. In re Harvey's Will (Iowa, 1903) 94 N. W. 559.

⁹² In re Cowdry's Will, 77 Vt. 359, 60 Atl. 141, 3 Ann. Cas. 70, holding such an adjudication insufficient to establish a prima facie case of incapacity.

DRUNKENNESS AS AFFECTING TESTAMENTARY CAPACITY

47. Although addiction to the use of intoxicating liquors is relevant on the question of testamentary capacity, yet a man, though under the influence of liquor at the time, and though an habitual drunkard, may yet make a valid will, if he can meet the test of testamentary capacity as hereinbefore set forth. No presumption of testamentary incapacity arises from the use of liquor, however excessive.

The test of testamentary capacity applies here,⁹³ as in all other cases. Experience shows that, while the excessive use of liquor tends to weaken the mental faculties, yet it does not usually result in their disability for the testamentary act. Hence such use does not establish incapacity to make a will.⁹⁴ And the facts that the testator was intoxicated, or under the influence of some drink or drug, at the time of executing the will, will not avoid the instrument if he is still capable of intelligently comprehending what he is doing.⁹⁵ So, though a man may be what is termed an habitual drunkard, there is no such thing as chronic intoxication, and there is no presumption, however habitually a man be addicted to the use of intoxicants, and however wholly he may be overcome by them when used, that he was in a drunken or incapable condition when his will was made.⁹⁶

⁹³ *Swygart v. Willard*, 166 Ind. 25, 76 N. E. 755; *Bannister v. Jackson*, 45 N. J. Eq. 702, 17 Atl. 692.

⁹⁴ *Fluck v. Rea*, 51 N. J. Eq. 233, 27 Atl. 836; *In re Hewitt's Will*, 31 Misc. Rep. 81, 64 N. Y. Supp. 571; *In re Halbert's Will*, 15 Misc. Rep. 308, 37 N. Y. Supp. 757; *In re Jones' Will*, 5 Misc. Rep. 199, 25 N. Y. Supp. 109; *In re Peck's Will*, 62 Hun, 622, 17 N. Y. Supp. 248; *In re Watson*, 58 Hun, 608, 12 N. Y. Supp. 115; *In re Schreiber's Will (Sur.)* 5 N. Y. Supp. 47; *In re Tasker's Estate*, 205 Pa. 455, 55 Atl. 24; *In re Schusler's Estate*, 198 Pa. 81, 47 Atl. 966; *Appeal of Harmony Lodge*, 127 Pa. 269, 18 Atl. 10.

⁹⁵ *Pierce v. Pierce*, 38 Mich. 412; *Frost v. Wheeler*, 43 N. J. Eq. 573, 12 Atl. 612; *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220; *Gardner v. Gardner*, 22 Wend. (N. Y.) 526, 34 Am. Dec. 340; *In re Reed's Will*, 2 Con. Sur. 403, 20 N. Y. Supp. 91.

⁹⁶ *In re Dugan's Estate*, 6 Pa. Dist. R. 222; *Hight v. Wilson*, 1 Dall. (U. S.) 94, 1 L. Ed. 51; *Temple v. Temple*, 1 Hen. & M. (Va.) 476; *Ayrey v. Hill*, 2 Add. 206; *In re Lee's Will*, 46 N. J. Eq. 193, 18 Atl. 525.

Though a person execute a will during an attack of delirium tremens, it will be sustained, if executed during a lucid interval. *Succession of Crouzelles*, 106 La. 442, 31 South. 64. See, also, *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220; *In re Miller's Will (Pa.)* 39 L. R. A. 220, note.

When there is conflicting testimony as to the degree of intoxication under which the testator was laboring at the time of executing the will, the question of testamentary capacity should be left to the jury, even though the provisions of the instrument are just and reasonable.⁹⁷

BURDEN OF PROOF

48. On principle, and by weight of authority, when the issue of testamentary capacity is raised, the burden of establishing such capacity by a preponderance of the evidence rests upon the parties alleging it, i. e., upon those who offer the instrument for probate. But many cases hold that upon this issue those alleging testamentary incapacity must prove it by a preponderance of the evidence.

Where there is no contest over the proposed probate of a will, proof of the execution of the will made by the witnesses thereto is usually sufficient, the presumption of sanity working the necessary prima facie proof of testamentary capacity.⁹⁸ But where probate is opposed on the ground of lack of testamentary capacity, and evidence is offered on both sides, the burden of proof is as indicated in the black-letter text.⁹⁹ The cases supporting this

⁹⁷ *Best v. Best's Ex'rs* (Ky.) 11 S. W. 810.

⁹⁸ *Councill v. Mayhew* (1911) 172 Ala. 295, 55 South. 314; *In re Hull's Will*, 117 Iowa, 738, 89 N. W. 979; *Taff v. Hosmer*, 14 Mich. 309; *Beaubien v. Clcotte*, 8 Mich. 9; *Perkins v. Perkins*, 39 N. H. 163; *In re Evans' Estate* (1903) 81 App. Div. 636, 81 N. Y. Supp. 1125; *Thompson v. Kyner*, 65 Pa. 368.

Even where the witnesses are questioned as to their opinion of the testator's capacity, such questioning is formal rather than necessary. See *Perkins v. Perkins*, *supra*.

But in Maine and Massachusetts it seems that such testimony by at least one of the witnesses must be had before the will can be probated. *Gerrish v. Nason*, 22 Me. 438, 39 Am. Dec. 589; *Brooks v. Barrett*, 7 Pick. (Mass.) 94. But even here, in event of the death or absence of the witnesses in parts unknown, proof of execution may be made by proof of the handwriting of the witnesses, whereupon the will is admitted to probate without further evidence of testamentary capacity. See *Baxter v. Abbott*, 7 Gray (Mass.) 71.

⁹⁹ *Wells v. Thompson*, 140 Ga. 119, 78 S. E. 823, 47 L. R. A. (N. S.) 722, Ann. Cas. 1914C, 898; *Evans v. Arnold*, 52 Ga. 169; *In re Thomson*, 92 Me. 563, 43 Atl. 511; *Hall v. Perry*, 87 Me. 569, 33 Atl. 160, 47 Am. St. Rep. 352; *Fulton v. Umbehend*, 182 Mass. 487, 65 N. E. 829; *Richardson v. Bly*, 181 Mass. 97, 63 N. E. 3; *Baxter v. Abbott*, 7 Gray (Mass.) 71; *CROWNINSHIELD v. CROWNINSHIELD*, 2 Gray (Mass.) 524, *Dunmore Cas. Wills*, 62; *Mansbach's Estate*, 150 Mich. 348, 114 N. W. 65; *Moriarty v. Moriarty*, 108 Mich. 249, 65 N. W. 964; *Prentis v. Bates*, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494, overruling 88 Mich. 567, 50 N. W. 637; *In re Layman's Will*, 40 Minn. 371, 42 N. W. 286; *Maddox v. Maddox*, 114 Mo. 35, 21 S. W. 499, 35 Am. St. Rep. 734;

view go upon the obvious ground that it is incumbent upon the party offering an instrument for probate to show that it meets all the requirements of the statute, and that, as a sound and disposing mind on the part of the would-be testator is a universal requirement of statutes relating to wills, the existence of this requisite must needs be shown. This is merely to apply the rule that the burden of proving every material allegation is upon the plaintiff. But there is almost equally weighty authority to the contrary.¹ These cases in substance hold that the contestants must satisfy the jury that the alleged testator was without capacity to make a will; if the evidence on the question is evenly balanced, probate will be allowed.

The Presumption of Sanity

This difference of opinion upon so important a matter is due to a misapprehension by those courts which take the latter view as to the effect of the presumption of sanity in shifting the burden of

Norton v. Paxton, 110 Mo. 456, 19 S. W. 807; Jones v. Roberts, 37 Mo. App. 163; Sheehan v. Kearney, 82 Miss. 688, 21 South. 41, 35 L. R. A. 102; Patten v. Cilley, 67 N. H. 520, 42 Atl. 47; Murry v. Hennessey, 48 Neb. 608, 67 N. W. 470; Chrisman v. Chrisman, 16 Or. 127, 18 Pac. 6; Prather v. McClelland (Tex. Civ. App.) 26 S. W. 657; Williams v. Robinson, 42 Vt. 658, 1 Am. Rep. 359; In re Baldwin's Estate, 13 Wash. 666, 43 Pac. 934; McMechen v. McMechen, 17 W. Va. 683, 41 Am. Rep. 682; Tucker v. Sandidge, 85 Va. 546, 8 S. E. 650; Rathjens v. Merrill, 38 Wash. 442, 80 Pac. 754; Wigmore on Ev. § 2500.

In Indiana, if contest is before probate, the burden is on proponent, but if contest is made after probate, the burden of proof rests upon contestants. Pepper v. Martin (1910) 175 Ind. 580, 92 N. E. 777.

¹ Barnewall v. Murrell, 108 Ala. 366, 18 South. 831; Murphree v. Senn, 107 Ala. 424, 18 South. 264; Knox v. Knox, 95 Ala. 495, 11 South. 125, 36 Am. St. Rep. 235; Eastis v. Montgomery, 95 Ala. 486, 11 South. 204, 36 Am. St. Rep. 227; Bims v. Collier, 69 Ark. 245, 62 S. W. 593; McCulloch v. Campbell, 49 Ark. 367, 5 S. W. 590; Clements v. McGinn, 4 Cal. Unrep. Cas. 163, 33 Pac. 920; In re Scott's Estate, 128 Cal. 57, 60 Pac. 527; Smith v. Day, 2 Pennewill (Del.) 245, 45 Atl. 396; Leach v. Burr, 17 App. D. C. 128, aff. 188 U. S. 510, 23 Sup. Ct. 393, 47 L. Ed. 567; Johnson v. Johnson, 187 Ill. 86, 58 N. E. 237; Entwistle v. Meikle, 180 Ill. 9, 54 N. E. 217; Hollenbeck v. Cook, 180 Ill. 65, 54 N. E. 154; Graybeal v. Gardner, 146 Ill. 337, 34 N. E. 528; Wilbur v. Wilbur, 129 Ill. 392, 21 N. E. 1076; Pendlay v. Eaton, 130 Ill. 69, 22 N. E. 853; In re Goldthorp's Estate, 115 Iowa, 430, 88 N. W. 944; Howe v. Richards, 112 Iowa, 220, 83 N. W. 909; Fee v. Taylor, 83 Ky. 259; Woodford v. Buckner, 111 Ky. 241, 63 S. W. 617; Boone v. Ritchie (Ky.) 53 S. W. 518; Howat v. Howat's Ex'r (Ky.) 41 S. W. 771 (see, however, Johnson v. Stivers, 95 Ky. 128, 23 S. W. 957); In re Murphy's Estate, 43 Mont. 353, 116 Pac. 1004, Ann. Cas. 1912C, 380; Southworth v. Southworth (1903) 173 Mo. 59, 73 S. W. 129; Tyson v. Tyson, 37 Md. 567; In re Burns' Will, 121 N. C. 836, 28 S. E. 519; McCoon v. Allen, 45 N. J. Eq. 708, 17 Atl. 820; Howard v. Moot, 64 N. Y. 262; Delafield v. Parish, 25 N. Y. 9; Jones v. Jones, 63 Hun, 630, 17 N. Y. Supp. 905; In re White's Will, 52 Hun, 613, 5 N. Y. Supp. 295; Messner v.

proof.² As a general rule, the presumption that men are sane until evidence to the contrary be adduced, whether it be called a presumption of law or of fact, or of both law and fact, is recognized as applying to the case of wills, and it thus works a prima facie proof of testamentary capacity.³ Consequently the burden of proof, as referring to the duty of offering evidence upon the issue, shifts to the contestant, i. e., the proponent has made out his prima facie case. This is the true effect of the presumption, and the only effect that it is, in principle, capable of having.⁴ But many courts have held that the burden of proof which this presumption causes to shift is the original burden of establishing the issue of testamentary capacity, and that, by force of the presumption, the contestant is called upon to prove testamentary incapacity to the satisfaction of the triers.⁵

The position is sometimes taken that the presumption of sanity establishes prima facie the testator's capacity, and is to be given weight, as having actual probative force, along with evidence of-

Elliott, 184 Pa. 41, 39 Atl. 46; *Key v. Holloway*, 7 Baxt. (Tenn.) 575; *Allen v. Griffin*, 69 Wis. 529, 35 N. W. 21.

² Confusion in this connection is frequently caused because the courts, in speaking of the burden of proof, do not always have in mind the same thing. By burden of proof some courts mean the risk of non-persuasion upon any issue in controversy while others mean merely the duty of producing evidence to the tribunal at any time during the trial. *Wigmore on Ev.* §§ 2485 and 2487. If burden of proof is used in the sense of the risk of non-persuasion, it never can properly be said to shift. *Idem.* § 2489.

³ *Barnewall v. Murrell*, 108 Ala. 366, 18 South. 831; *Taylor v. McClintock*, 87 Ark. 243, 112 S. W. 405; *STURDEVANT'S APPEAL*, 71 Conn. 393, 42 Atl. 70, *Dunmore Cas. Wills*, 65; *Steele v. Helm*, 2 Marv. (Del.) 237, 43 Atl. 153; *Ethridge v. Bennett*, 9 Houst. (Del.) 295, 31 Atl. 813; *Craig v. Southard*, 162 Ill. 209, 44 N. E. 393; *Blough v. Parry*, 144 Ind. 463, 40 N. E. 70, 43 N. E. 560; *Lindsey v. Stephens* (1910) 229 Mo. 600, 129 S. W. 641; *Mayo v. Jones*, 78 N. C. 402; *Perkins v. Perkins*, 39 N. H. 163; *DeLafield v. Parish*, 25 N. Y. 9; *Beresford v. Stanley*, 6 Ohio N. P. 38; *Messner v. Elliott*, 184 Pa. 41, 39 Atl. 46; *In re Hoyt Estate*, 10 Kulp (Pa.) 166; *Wallen v. Wallen*, 107 Va. 131, 57 S. E. 596.

Contra, *IN RE AMERICAN BOARD OF COM'RS FOR FOREIGN MISSIONS*, 102 Me. 72, 66 Atl. 215, *Dunmore Cas. Wills*, 60, and *In re Baldwin's Estate*, 13 Wash. 666, 43 Pac. 934.

The presumption of competency to make a will is not destroyed by any extremity of age. *In re Carpenter's Will* (Sur.) 145 N. Y. Supp. 365; *In re Campbell's Will* (Sur.) 136 N. Y. Supp. 1086; *Woody v. Taylor*, 114 Va. 737, 77 S. E. 498.

⁴ *Thayer*, *Pre. Treat. on Evid.* 382; *Sutton v. Sadler*, 3 C. B. (N. S.) 87; *Symes v. Green*, 1 Sw. & Tr. 401; *Baxter v. Abbott*, 7 Gray (Mass.) 71.

⁵ This view requires the contestant to cause his scale to incline. The true view is that he is merely required to cause the scales to balance. Probably all that many of the cases on this subject mean to imply is that the effect of the presumption of sanity is so strong that much evidence must be produced

ferred by the proponent, and that, the other evidence offered by each party being equal, such presumption is sufficient to turn the scale in favor of the proponent.⁶

Effect of Statutes on Burden of Proof

Statutes frequently provide that the probate of a will shall be prima facie evidence of its due execution and validity in case of a later contest. Such statutes usually have been construed as placing the burden of proof in the later suit upon the contestant,⁷ although a more obvious interpretation would be to hold that the prima facie case simply shifts the duty of going forward to the contestant, but does not affect the burden on the proponent of establishing ultimately the question in issue.

Right to Open and Close

Where the burden of showing testamentary capacity is upon the proponent, he has the right to open and close.⁸ Where the burden is on the contestant, he should, on principle, have this right, and such is the case in certain jurisdictions.⁹

Question for Jury

The existence of testamentary capacity, being a question of fact, is for the jury.¹⁰

by the defendant to restore the scales to their original equilibrium, but their language is unequivocal, in many instances, that more than this is required of the contestant.

⁶ *STURDEVANT'S APPEAL*, 71 Conn. 392, 42 Atl. 70, Dunmore Cas. Wills, 65. See, also, *Doble v. Armstrong*, 160 N. Y. 584, 55 N. E. 302. A presumption cannot properly be given this effect. While, in consequence of the fact that men are more commonly sane than otherwise, a person alleging insanity may be fairly called upon to offer some evidence to show it, yet, such evidence once offered, there is surely no presumption that the individual whom it concerns is sane. In fact, if the evidence is at all significant, the presumption, were there one at all, would be otherwise. See Thayer, *Pre. Treat. on Evid.* 336.

⁷ *McGown v. Underhill*, 115 App. Div. 638, 101 N. Y. Supp. 313; *Doble v. Armstrong*, 160 N. Y. 584, 55 N. E. 302; *Mears v. Mears*, 15 Ohio St. 90.

⁸ *Comstock v. Society*, 8 Conn. 261, 20 Am. Dec. 100; *Robinson v. Adams*, 62 Me. 369, 16 Am. Rep. 473; *Brooks v. Barrett*, 7 Pick. (Mass.) 96; *Taff v. Hosmer*, 14 Mich. 309; *Boardman v. Woodman*, 47 N. H. 120; *Syme v. Broughton*, 85 N. C. 367; *Williams v. Robinson*, 42 Vt. 658, 1 Am. Rep. 359.

⁹ *Chandler v. Ferris*, 1 Har. (Del.) 460; *Tyson v. Tyson*, 37 Md. 567; *Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 666; *Townshend v. Townshend*, 7 Gill (Md.) 24.

¹⁰ *Slingloff v. Bruner*, 174 Ill. 561, 51 N. E. 772; *Keithley v. Stafford*, 126 Ill. 507, 18 N. E. 740; *Bever v. Spangler*, 93 Iowa, 576, 61 N. W. 1072; *Primmer v. Primmer*, 75 Iowa, 415, 39 N. W. 676; *Morris v. Morton's Ex'rs* (Ky.) 20 S. W. 287; *Sydner's Ex'r v. Cunningham* (Ky.) 16 S. W. 130; *Hegney v. Head*, 126 Mo. 619, 29 S. W. 587; *Petrie v. Petrie*, 126 N. Y. 683, 27 N. E. 958;

EVIDENCE RELATING TO TESTAMENTARY CAPACITY

49. Any evidence, relevant to the issue, and legally admissible, may be received. Matters peculiarly significant in this connection are:

- (a) Insanity of the testator before or after the making of the will.
- (b) The character of the will itself.
- (c) Declarations of the testator, as indicative of his mental condition.

Prior or Subsequent Insanity

Chronic insanity, once shown to exist, is presumed to continue, and, occurring before the making of the will, the proponent has the burden of showing that the testator had recovered at the time of executing the instrument or that it was executed during a lucid interval.¹¹ But, where the insanity is due to a temporary cause, the effect is presumed to disappear with the occasion. There is therefore no presumption that insanity thus caused continues.¹²

In re Well, 48 Hun, 621, 1 N. Y. Supp. 91; *Appeal of Ulmer* (Pa.) 12 Atl. 686; *Trezevant v. Rains* (Tex.) 19 S. W. 567.

¹¹ *Murphree v. Senn*, 107 Ala. 424, 18 South. 264; *Johnson v. Armstrong*, 97 Ala. 731, 12 South. 72; *James White Memorial Home v. Haeg*, 204 Ill. 422, 68 N. E. 568; *Bever v. Spangler*, 93 Iowa, 576, 61 N. W. 1072; *Jones v. Collins*, 94 Md. 403, 51 Atl. 398; *Von de Veld v. Judy*, 143 Mo. 348, 44 S. W. 1117; *Elkinton v. Brick*, 44 N. J. Eq. 154, 15 Atl. 391, 1 L. R. A. 161; *In re Widmayer's Will*, 74 App. Div. 336, 77 N. Y. Supp. 663; *Saxon v. Whitaker's Ex'r*, 30 Ala. 237; *Halley v. Webster*, 21 Me. 461; *Lucas v. Parsons*, 27 Ga. 593; *In re Lapham's Will*, 19 Misc. Rep. 71, 44 N. Y. Supp. 90; *In re Kiedaisch's Will*, 2 Con. Sur. 438, 13 N. Y. Supp. 255; *In re Hoopes' Estate*, 174 Pa. 373, 34 Atl. 603; *Manley's Ex'r v. Staples*, 65 Vt. 370, 26 Atl. 630; *Cartwright v. Cartwright*, 1 Phillim. 100; *White v. Driver*, 1 Phillim. 84; *Gombault v. Public Adm'r*, 4 Bradf. Sur. (N. Y.) 226; *Harden v. Hays*, 9 Pa. 151; *Goble v. Grant*, 3 N. J. Eq. 629; *Jackson v. Van Dusen*, 5 Johns. (N. Y.) 144, 4 Am. Dec. 330; *Keely v. Moore*, 196 U. S. 38, 25 Sup. Ct. 169, 49 L. Ed. 376.

Such is apparently the almost universal rule, regardless of the question as to which party has the burden of proof upon the issue of testamentary capacity. To be entirely consistent, courts holding that the contestant must show incapacity should also hold that, when the proponent has produced sufficient evidence of recovery or of the existence of a lucid interval at the time the will was executed to make it "an even cast" whether or no there was testamentary capacity, the will should be admitted to probate. For when this is the situation, the caveator has, of course, not established testamentary incapacity.

In Indiana, the risk of non-persuasion remains upon contestant even after he has established that testator was of unsound mind at a time prior to the execution of will. *Branstrator v. Crow*, 162 Ind. 362, 69 N. E. 668.

¹² *Johnson v. Armstrong*, 97 Ala. 731, 12 South. 72; *In re Wilson's Estate*, 117 Cal. 262, 49 Pac. 172, 711; *Branstrator v. Crow*, 162 Ind. 362, 69 N. E.

But, if unsoundness of mind exists shortly before or after the making of the will, this is evidence to be considered in determining the mental condition of the testator at the time when the will was made, regardless of the temporary or permanent character of the unsoundness.¹³ In the former case there is merely no presumption of its continuance sufficient to make out a prima facie case against the will. Thus the fact that the testator had an epileptic fit on the day when the will was made, but prior to the execution thereof, does not establish lack of capacity at the moment of execution.¹⁴

Evidence of testator's condition before or after the making of a will is only admissible when it tends to show his capacity at the time of the execution of the will,¹⁵ and it is left to the discretion of the trial court to fix the time to which the inquiry as to capacity should be limited.¹⁶

The Character of the Will Itself

A competent testator may, apart from statutory restrictions, make any kind of a will that pleases him. But, in determining the question of competency, the character of the will itself is extremely significant. A rational act, rationally done, is convincing proof that a rational being did it. "The strongest and best proof that can arise as to a lucid interval is that which arises from the act itself."¹⁷ Indeed, sometimes the intrinsically reasonable character of a will gives rise to a presumption that it was executed during a lucid interval, though the testator be chronically insane.¹⁸ So, if the provisions of the will are just, reasonable, and natural, they point toward

668; *Taylor v. Pegram*, 151 Ill. 106, 37 N. E. 837; *In re Glass' Estate*, 127 Iowa, 646, 103 N. W. 1013; *Blake v. Rourke*, 74 Iowa, 519, 38 N. W. 392; *Williams' Ex'r v. Williams*, 90 Ky. 28, 13 S. W. 250; *Hix v. Whittemore*, 4 Metc. (Mass.) 545; *Von de Veld v. Judy*, 143 Mo. 348, 44 S. W. 1117; *In re Lyddy's Will*, 53 Hun, 629, 5 N. Y. Supp. 636; *Koegel v. Egner*, 54 N. J. Eq. 623, 35 Atl. 394; *Reichenbach v. Ruddach*, 127 Pa. 564, 18 Atl. 432.

¹³ *Spencer v. Terry's Estate* (1903) 133 Mich. 39, 94 N. W. 372; *Moore v. Heineke*, 119 Ala. 627, 24 South. 374; *Mitchell v. Corpening*, 124 N. C. 472, 32 S. E. 798. See, also, *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113; *Trezevant v. Rains* (Tex. Civ. App.) 25 S. W. 1092.

¹⁴ *In re Johnson's Will*, 7 Misc. Rep. 220, 27 N. Y. Supp. 649.

¹⁵ *Todd v. Todd*, 221 Ill. 410, 77 N. E. 680.

¹⁶ *McCoy v. Jordan*, 184 Mass. 575, 69 N. E. 358; *In re Winch*, 84 Neb. 251, 121 N. W. 116, 18 Ann. Cas. 903.

Evidence of testator's condition three years before the execution of his will was excluded in *Henry Blood's Will*, 62 Vt. 359, 19 Atl. 770, and in *Hardy v. Martin*, 200 Mass. 548, 86 N. E. 939, the court limited evidence of insanity to six years before will made.

¹⁷ *Sir William Wynne in Cartwright v. Cartwright*, 1 Phillim. 90.

¹⁸ *Wood v. Salter*, 118 La. 695, 43 South. 281; *Succession of Bey*, 46 La. Ann. 773, 15 South. 297, 24 L. R. A. 577.

a normal testator; otherwise towards an abnormal testator.¹⁹ And the contestant may urge the unjust treatment accorded by the will to a third party who does not himself resist the probate.²⁰ But the character of the will is only to be considered, along with other evidence bearing on the issue, and gross inequality of distribution among the natural objects of testator's bounty does not of itself establish testamentary incapacity.²¹ If testamentary capacity is proved to have existed, the will is valid although "as eccentric, as injudicious, or as unjust as caprice, frivolity, or revenge can dictate."²²

Declarations of the Testator

Declarations of the testator, made at the time of the execution of the will, and so closely identified therewith as to form part of the *res gestæ*, are admissible to shed light upon his mental condition.²³ And, in general, declarations of the testator, having this effect and made at such a time that the testator's mental condition at that time is relevant to his mental condition at the time of executing the will, may be received independent of the doctrine of *res gestæ*.²⁴

¹⁹ *Henry v. Hall*, 106 Ala. 84, 17 South. 187, 54 Am. St. Rep. 22; *Coleman v. Robertson's Ex'rs*, 17 Ala. 84; *In re Wilson's Estate*, 117 Cal. 262, 49 Pac. 172, 711; *In re Shell's Estate*, 28 Colo. 167, 63 Pac. 413, 53 L. R. A. 387, 89 Am. St. Rep. 181; *Denison's Appeal*, 29 Conn. 405; *Lamb v. Lamb*, 105 Ind. 457, 5 N. E. 171; *Bottom v. Bottom* (1907) 106 S. W. 216, 32 Ky. Law Rep. 494; *Newcomb's Ex'r v. Newcomb*, 96 Ky. 120, 27 S. W. 997; *Brown v. Bell*, 58 Mich. 58, 24 N. W. 824; *Barker v. Comins*, 110 Mass. 477; *In re Budlong*, 126 N. Y. 423, 27 N. E. 945; *In re Comstock's Estate* (Sur.) 7 N. Y. Supp. 334; *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220; *In re Burns' Will*, 121 N. C. 336, 28 S. E. 519; *Prather v. McClelland* (Tex. Civ. App.) 26 S. W. 657; *In re Jackman's Will*, 26 Wis. 104; *Dew v. Clark*, 3 Addams, 90; *Arbery v. Ashe*, 1 Hagg. 214; *Boughton v. Knight*, L. R. 3 P. & D. 64; *Nichols v. Binns*, 1 Sw. & Tr. 239.

²⁰ *Pergason v. Etcherson*, 91 Ga. 785, 18 S. E. 29.

²¹ *Abrahams v. Woolley*, 243 Ill. 365, 90 N. E. 667; *Mileham v. Montagne* (1910) 148 Iowa, 476, 125 N. W. 664; *Bottom v. Bottom*, 106 S. W. 216, 32 Ky. Law Rep. 494; *Smith v. Shuppner*, 125 Md. 409, 93 Atl. 514.

²² *Schneider v. Vosburgh*, 143 Mich. 476, 106 N. W. 1129.

²³ *Waugh v. Moan*, 200 Ill. 298, 65 N. E. 713; *Dickie v. Carter*, 42 Ill. 376; *Colvin v. Warford*, 20 Md. 357; *May v. Bradlee*, 127 Mass. 414; *Gibson v. Gibson*, 24 Mo. 227; *Meeker v. Boylan*, 28 N. J. Law, 274; *McTaggart v. Thompson*, 14 Pa. 149.

²⁴ *Bulger v. Ross*, 98 Ala. 267; 12 South. 803; *Flowers v. Flowers*, 74 Ark. 212, 85 S. W. 242; *Denison's Appeal*, 29 Conn. 399; *Ball v. Kane*, 1 Pennewill (Del.) 90, 39 Atl. 778; *Nieman v. Schnitker*, 181 Ill. 400, 55 N. E. 151; *Moore v. Gubbins*, 54 Ill. App. 163; *Conway v. Vizzard*, 122 Ind. 266, 23 N. E. 771; *Manatt v. Scott*, 106 Iowa, 203, 76 N. W. 717, 68 Am. St. Rep. 293; *Bever v. Spangler*, 93 Iowa, 576, 61 N. W. 1072; *Haines v. Hayden*, 95 Mich. 332, 54 N. W. 911, 35 Am. St. Rep. 566; *Hammond v. Dike*, 42 Minn. 273, 44 N. W. 61, 18 Am. St. Rep. 503; *In re Brown*, 38 Minn. 112, 35 N. W. 726; *Sheehan v.*

Such declarations, in both cases, are admissible solely as disclosing the testator's state of mind, and not as evidence of the truth of the facts which they may allege.²⁶ The declarations may have been made before²⁶ or after²⁷ the execution of the will. No definite rule can be laid down to determine when the declarations offered are too remote in time from the execution of the will to be relevant to the testator's mental state at the time of execution. This rests largely in the discretion of the court.²⁸ Declarations made eighteen,²⁹ seventeen,³⁰ and five³¹ years prior to the execution of the will have been held too remote.

The same principles apply to written as to oral declarations, such as letters,³² or an answer to a suit brought upon a contract entered

Kearney, 82 Miss. 688, 21 South. 41, 35 L. R. A. 102; *In re Woodward's Will*, 167 N. Y. 28, 60 N. E. 233; *Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71; *In re Dates*, 58 Hun, 608, 12 N. Y. Supp. 205; *In re Burns' Will*, 121 N. C. 336, 28 S. E. 519; *Peery v. Peery*, 94 Tenn. 328, 29 S. W. 1; *McIntosh v. Moore*, 22 Tex. Civ. App. 22, 53 S. W. 611.

²⁶ *Wilkinson v. Service*, 249 Ill. 146, 94 N. E. 50, Ann. Cas. 1912A, 41; *Crowson v. Crowson* (1903) 172 Mo. 691, 72 S. W. 1065; *Canada's Appeal*, 47 Conn. 450; *Gibson v. Gibson*, 24 Mo. 227; *In re Cooper's Will* (1909) 75 N. J. Eq. 177, 71 Atl. 676; *In re Benjamin's Will* (Sur.) 136 N. Y. Supp. 1070; *Jackson v. Kniffen*, 2 Johns. (N. Y.) 31, 3 Am. Dec. 390; *Moritz v. Brough*, 16 Serg. & R. (Pa.) 405; *Provis v. Reed*, 5 Bing. 435.

They have, however, been held admissible to show motives, feelings, or designs entertained by the testator in the past. *Barbour v. Moore*, 4 App. D. C. 535.

²⁶ *In re Snowball's Estate* (1910) 157 Cal. 301, 107 Pac. 598; *Goodbar v. Lidkey*, 136 Ind. 1, 35 N. E. 691, 43 Am. St. Rep. 296; *Estate of Lefevre*, 102 Mich. 568, 61 N. W. 3; *Chappell v. Trent*, 90 Va. 849, 19 S. E. 314.

²⁷ *Dennis v. Weekes*, 51 Ga. 24; *Hill v. Bahrns*, 158 Ill. 314, 41 N. E. 912; *O'Dell v. Goff*, 140 Mich. 152, 112 N. W. 736, 10 L. R. A. (N. S.) 989, 119 Am. St. Rep. 662; *Kirkpatrick v. Jenkins' Ex'rs*, 96 Tenn. 85, 33 S. W. 819.

²⁸ *Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71.

²⁹ *Healea v. Keenan*, 244 Ill. 484, 91 N. E. 646.

³⁰ *Langford's Estate*, 108 Cal. 608, 41 Pac. 701.

³¹ *Bonnemort v. Gill*, 165 Mass. 493, 43 N. E. 299.

In Appeal of Dale, 57 Conn. 127, 17 Atl. 757, it was held that evidence as to the mental condition of the testatrix during the last week of her life was admissible, though the will was made seven years before, its weight being for the jury to determine; and it has been said that evidence to establish the testator's capacity may cover any period of time before or after the execution of the will. *Jones v. Collins*, 94 Md. 403, 51 Atl. 398. Evidence of the testator's mental condition three months after making the will may be received. *Hamburger v. Rinkel*, 164 Mo. 398, 64 S. W. 104.

³² *Bulger v. Ross*, 98 Ala. 267, 12 South. 803; *In re Brunor*, 21 App. Div. 259, 47 N. Y. Supp. 681; *Slingloff v. Bruner*, 174 Ill. 561, 51 N. E. 772; *Woodward v. Sullivan*, 152 Mass. 470, 25 N. E. 837; *Foster's Ex'rs v. Dickerson*, 64 Vt. 233, 24 Atl. 253.

But a letter offered only to explain certain actions is inadmissible unless it can be shown to have been written at about the time when the acts were done. *Clements v. McGinn*, 4 Cal. Unrep. Cas. 163, 33 Pac. 920.

into by the decedent.³³ Prior wills have also been admitted as showing the settled purpose of the testator, a subsequent unexplained departure from which might indicate insanity;³⁴ and it seems that they might also be received as bearing, like any other declarations, upon the general question of the testator's mental condition.³⁵

Other Matters Regarded as Relevant

While the fact of the testator's suicide may be considered as bearing upon his condition at the time when the will was executed,³⁶ it does not, of itself, give rise to any presumption against testamentary capacity.³⁷

The insanity of the testator's ancestors and collateral relatives, if hereditary in its character, may be shown;³⁸ otherwise not.³⁹

But where there has been no offer of direct proof of the testator's insanity, evidence cannot be received as to the insanity of other members of his family.⁴⁰

³³ *Manatt v. Scott*, 106 Iowa, 203, 76 N. W. 717, 68 Am. St. Rep. 293.

³⁴ *Hughes v. Hughes' Ex'r*, 31 Ala. 519; *Taylor v. Pegram*, 151 Ill. 106, 37 N. E. 837; *Barlow v. Waters* (Ky.) 28 B. W. 785; *Hammond v. Dike*, 42 Minn. 273, 44 N. W. 61, 18 Am. St. Rep. 503.

Contra: *Brown v. Mitchell*, 88 Tex. 350, 31 S. W. 621, 36 L. R. A. 64.

³⁵ *Nieman v. Schnitker*, 181 Ill. 400, 55 N. E. 151; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668; *Koegel v. Egner*, 54 N. J. Eq. 623, 35 Atl. 394; *Frary v. Gusha*, 59 Vt. 257, 9 Atl. 549; *Burrows v. Burrows*, 1 Hagg. 109.

³⁶ *Duffield v. Morris' Ex'r*, 2 Har. (Del.) 375; *Brooks v. Barrett*, 7 Pick. (Mass.) 94; *In re Card's Will*, 55 Hun, 607, 8 N. Y. Supp. 297; *Frary v. Gusha*, 59 Vt. 257, 9 Atl. 549.

³⁷ *In re Miller's Will* (1912) 3 Boyce (Del.) 477, 85 Atl. 803; *Succession of Bey*, 46 La. Ann. 773, 15 South. 297, 24 L. R. A. 577; *Roche v. Nason*, 185 N. Y. 128, 77 N. E. 1007; *In re Card's Will*, 55 Hun, 607, 8 N. Y. Supp. 297; *Koegel v. Egner*, 54 N. J. Eq. 623, 35 Atl. 394.

³⁸ *Snow v. Benton*, 28 Ill. 306; *Baxter v. Abbott*, 7 Gray (Mass.) 71; *Prentis v. Bates*, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494 (overruling *Prentis v. Bates*, 88 Mich. 567, 50 N. W. 637).

Where evidence is admitted tending to show that testatrix was the victim of hereditary insanity acquired both from her mother's and father's people, such evidence may be rebutted by evidence that her father had never shown any trace of insanity in his lifetime. *In re Dolbeer's Estate*, 149 Cal. 227, 86 Pac. 695, 9 Ann. Cas. 795.

³⁹ *Reichenbach v. Ruddach*, 127 Pa. 564, 18 Atl. 432, holding that evidence that testator's father became insane in consequence of intemperate habits was inadmissible to show testator's lack of capacity. Probably evidence that insanity thus occasioned was transmissible would lead to a different result. See *Titus v. Gage*, 70 Vt. 13, 39 Atl. 246.

While the rule stated in the text is correct on principle, evidence of the insanity of testator's relatives is sometimes admitted without proof that the insanity of relatives was of a kind that was hereditary. *Dillman v. McDanel*, 222 Ill. 276, 78 N. E. 591, 113 Am. St. Rep. 400.

⁴⁰ *Berry v. Trust Co.*, 96 Md. 45, 53 Atl. 720; *Pringle v. Burroughs*, 185 N. Y. 375, 78 N. E. 150, 7 Ann. Cas. 264.

Evidence as to the impairment of the memory and of the impairment of any mental faculty of the testator is admissible,⁴¹ as is also that relating to his appearance, conduct, manners, and habits.⁴²

So the testator's conduct⁴³ or silence⁴⁴ when his mental condition was mentioned in his presence may be shown, as may also the person from whom the testator derived the bulk of his property,⁴⁵ and deeds and other business papers executed by the testator after⁴⁶ and before⁴⁷ making his will. So, also, the conduct of the disinherited heirs towards the testator;⁴⁸ the consistency of the will with the natural inclinations and previously declared intentions of the testator;⁴⁹ the circumstances and character of the executors;⁵⁰ knowledge by the testator, eight months before making the will, of the amount and character of his property;⁵¹ moral worth of a son as rebutting evidence that he was regarded with disfavor by the testator;⁵² character and pecuniary condition of an agent employed by the testator in the transaction of his business;⁵³ inability to converse at interviews occurring some time prior to death of testator, whose capacity was assailed by reason of the excessive use of morphine and whisky;⁵⁴ statements by the testator as to his treatment of his wife on their marriage night;⁵⁵ expressions of a

⁴¹ *Daly v. Daly*, 183 Ill. 269, 55 N. E. 671; *Appeal of Richmond*, 59 Conn. 226, 22 Atl. 82, 21 Am. St. Rep. 85.

⁴² *In re Evans' Estate*, 114 Iowa, 240, 86 N. W. 283. A photograph of the testator, however, has been held not admissible. *Varner v. Varner*, 16 Ohio Cir. Ct. R. 386.

Evidence of the excessive use of intoxicating liquors by testator is admissible on the issue of mental capacity. *Swygart v. Willard*, 166 Ind. 25, 76 N. E. 755.

⁴³ *In re Fenton's Will*, 97 Iowa, 192, 66 N. W. 99.

⁴⁴ *Meeker v. Meeker*, 74 Iowa, 352, 37 N. W. 773, 7 Am. St. Rep. 489.

⁴⁵ *Pergason v. Etcherson*, 91 Ga. 785, 18 S. E. 29; *In re Wilson's Estate*, 117 Cal. 262, 49 Pac. 172, 711.

⁴⁶ *Morris v. Morton's Ex'rs* (Ky.) 20 S. W. 287; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668.

⁴⁷ *Messner v. Elliott*, 184 Pa. 41, 39 Atl. 46.

It has been held, however, not error to exclude a deed, executed by the testator about a year and a half prior to the making of the will, whereby he conveyed a large tract of land to his daughter, who was a principal beneficiary under the will. *Kelley v. Kelley*, 168 Ill. 501, 48 N. E. 158.

⁴⁸ *Burkhart v. Gladish*, 123 Ind. 337, 24 N. E. 118.

⁴⁹ *In re Shapter's Estate*, 35 Colo. 578, 85 Pac. 688, 6 L. R. A. (N. S.) 575, 117 Am. St. Rep. 216; *Hammond v. Dike*, 42 Minn. 273, 44 N. W. 61, 18 Am. St. Rep. 503.

⁵⁰ *Prather v. McClelland*, 76 Tex. 574, 13 S. W. 543.

⁵¹ *Carpenter v. Hatch*, 64 N. H. 573, 15 Atl. 219.

⁵² *Frary v. Gusha*, 59 Vt. 257, 9 Atl. 549.

⁵³ *Id.*

⁵⁴ *In re Gilham's Will*, 64 N. J. Eq. 715, 52 Atl. 690.

⁵⁵ *Brashears v. Orme*, 93 Md. 442, 49 Atl. 620.

wish for death;⁶⁶ vacillating religious beliefs;⁶⁷ reasons for disinheriting heirs;⁶⁸ sudden termination of friendly relations with a near relative without apparent cause;⁶⁹ the honesty of persons about whom the testatrix was alleged to have entertained the insane delusion that they had stolen some of her property;⁷⁰ kindly relations between testator and his family;⁷¹ business letters showing that business men regarded the testator as capable of transacting business before, when, and after the will was executed;⁷² testator's failure to make out his own tax lists for two years after the execution of the will;⁷³ testator's statements of grounds for an alleged groundless antipathy towards his brother;⁷⁴ a letter written by an attorney, with authority from the testatrix, thirty months prior to the execution of the will, repudiating a transaction entered into by the testatrix;⁷⁵ illicit relations between the testator and his illegitimate daughter;⁷⁶ evidence tending to show that prior to the making of the will the contestant regarded the testator as competent to do business;⁷⁷ spendthrift habits of a son for whom the testator by codicil created an estate in trust, instead of the fee provided by the will⁷⁸—are all admissible on the issue of testamentary capacity. Such, in general, is the case with any fact which is more consistent with either the theory of capacity or incapacity than with the opposite theory.⁷⁹

Declarations Against Interest

The admissions of a sole beneficiary, in disparagement of the capacity of the testator, made after the execution of the will, are admissible as declarations against interest.⁷⁰ But as the admissions of one person cannot be received, if it will affect the rights of another not jointly interested with the first in the matter to be af-

⁶⁶ *Id.* ⁶⁷ *Id.* ⁶⁸ *Patten v. Cilley*, 67 N. H. 520, 42 Atl. 47.

⁶⁹ *Manatt v. Scott*, 106 Iowa, 203, 76 N. W. 717, 68 Am. St. Rep. 293.

⁷⁰ *Titus v. Gage*, 70 Vt. 13, 39 Atl. 246.

⁷¹ *In re Burns' Will*, 121 N. C. 336, 28 S. E. 519.

⁷² *Wilcoxon v. Wilcoxon*, 165 Ill. 454, 46 N. E. 369.

⁷³ *Bower v. Bower*, 142 Ind. 194, 41 N. E. 523.

⁷⁴ *Stevens v. Leonard*, 154 Ind. 67, 56 N. E. 27, 77 Am. St. Rep. 446.

⁷⁵ *Woodward v. Sullivan*, 152 Mass. 470, 25 N. E. 837.

⁷⁶ *Johnson v. Armstrong*, 97 Ala. 731, 12 South. 72.

⁷⁷ *Sim v. Russell*, 90 Iowa, 656, 57 N. W. 601.

⁷⁸ *Prather v. McClelland* (Tex. Civ. App.) 26 S. W. 657.

⁷⁹ *Prentiss v. Bates*, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494.

⁷⁰ *Blakey's Heirs v. Blakey's Ex'x*, 33 Ala. 611; *Egbers v. Egbers*, 177 Ill. 82, 52 N. E. 285; *In re Ames*, 51 Iowa, 596, 2 N. W. 408; *Ware v. Ware*, 8 Me. (8 Greenl.) 42; *Brick v. Brick*, 66 N. Y. 144; *Thompson v. Thompson*, 13 Ohio St. 356; *Clark v. Morrison*, 25 Pa. 453; *Forney v. Ferrell*, 4 W. Va. 729.

Declarations of this character made before the execution of the will are

fect by the admissions, the prevailing rule is that, where there are several beneficiaries, the declarations of one are inadmissible, as thereby the rights of all might be prejudiced.⁷¹ Evidence of statements of persons not parties to the suit as to the testator's capacity is, of course, inadmissible.⁷²

Adjudication of Insanity

The record of the proceedings resulting in commitment for insanity, or the appointment of a guardian on this ground, establishes such insanity, *prima facie*, as existing both at the time and thereafter.⁷³ The record of the discharge of a guardian or from commitment is only *prima facie* evidence of a cure.⁷⁴

Where the guardian was not appointed until two or three years

clearly inadmissible, as there is there no interest to which they would be adverse. *In re Ames*, 51 Iowa, 596, 2 N. W. 408; *Burton v. Scott*, 8 Rand. (Va.) 399.

While it is said that the execution of the will is the time at which the interest arises, yet it is clear that knowledge of its provisions in favor of the declarant would be necessary to render his admission regarding the incapacity of the testator against his interest. It can hardly be conceived that a declaration subsequent to the execution of the will, but in ignorance of its contents, could be properly admitted.

⁷¹ *La Bau v. Vanderbilt*, 3 Redf. Sur. (N. Y.) 384; *Shaller v. Bumstead*, 99 Mass. 112; *Blakey's Heirs v. Blakey's Ex'x*, 33 Ala. 616; *In re Dolbeer's Estate*, 149 Cal. 227, 86 Pac. 695, 9 Ann. Cas. 795; *Dan v. Brown*, 4 Cow. (N. Y.) 492, 15 Am. Dec. 395; *Osgood v. Manhattan Co.*, 3 Cow. (N. Y.) 612, 15 Am. Dec. 304; *Clark v. Morrison*, 25 Pa. 453; *Titlow v. Titlow*, 54 Pa. 222, 93 Am. Dec. 691; *Bovard v. Wallace*, 4 Serg. & R. (Pa.) 499; *Thompson v. Thompson*, 13 Ohio St. 356; *Forney v. Ferrell*, 4 W. Va. 729; *Morris v. Stokes*, 21 Ga. 552; *Brown v. Moore*, 6 Yerg. (Tenn.) 272; *Appeal of Livingston*, 63 Conn. 68, 26 Atl. 470; *McMillan v. McDill*, 110 Ill. 47; *Roller v. Kling*, 150 Ind. 159, 49 N. E. 948; *Fothergill v. Fothergill* (1905) 129 Iowa, 93, 105 N. W. 377; *Renaud v. Pageot*, 102 Mich. 568, 61 N. W. 3; *Fairchild v. Bascomb*, 35 Vt. 398; *Whitelaw's Adm'r v. Whitelaw's Adm'r*, 96 Va. 712, 32 S. E. 458.

Contra: *Beall v. Cunningham*, 1 B. Mon. (Ky.) 399; *Peeples v. Stevens*, 8 Rich. (S. C.) 198, 64 Am. Dec. 750.

In *Williamson v. Nabers*, 14 Ga. 286, the court admitted evidence of the declarations of the executrix who propounded the will and who was also a legatee but there seems to be no good reason why such evidence should have been received against the other legatees.

⁷² *Appeal of Dale*, 57 Conn. 127, 17 Atl. 757; *Naul v. Naul*, 75 App. Div. 292, 78 N. Y. Supp. 101.

⁷³ *Estate of Johnson*, 57 Cal. 529; *Rice v. Rice*, 50 Mich. 448, 15 N. W. 545; *Hamilton v. Hamilton*, 10 R. I. 538.

Such an adjudication is sometimes regarded as conclusive upon the mental condition of the testator at the time, and evidence to show restoration only is admissible. *In re Hoopes' Estate*, 174 Pa. 373, 34 Atl. 603.

⁷⁴ *In re Will of Fenton*, 97 Iowa, 192, 66 N. W. 99.

after the execution of the will, the record showing the appointment may properly be denied admission.⁷⁵

Appointment of a Conservator

Evidence of a decree for the appointment of a conservator to take care of the property of testator is admissible as bearing on testamentary capacity,⁷⁶ but such evidence alone does not create a presumption of incapacity.⁷⁷

Matters Irrelevant

On the issue of testamentary capacity an unsigned and undated letter of the testatrix is inadmissible;⁷⁸ as is also the fact that the executor nominated was a man of wealth;⁷⁹ and that the testator's widow objected to his executing the will because he was unable to attend to business;⁸⁰ and that a jury had found that the testatrix was of unsound mind in a contest over a subsequent will on that ground;⁸¹ and that the testator held certain offices after making the will, where no offer is made to show the ability with which the duties connected therewith were discharged;⁸² and that difficulties occurred between the contestant and the testator's wife subsequent to the making of the will;⁸³ and that testatrix complained of her neighbors for procuring a pipe to be laid on a certain side of the street;⁸⁴ and that boys on the street made fun of the testatrix.⁸⁵

It is immaterial that the will would have been the same, had testator possessed capacity,⁸⁶ or that testator's conduct was dissolute

⁷⁵ *Entwistle v. Meikle*, 180 Ill. 9, 54 N. E. 217; *In re Harvey's Will* (Iowa, 1903) 94 N. W. 559.

Evidence of an adjudication of testator's insanity, within a reasonable time after execution of will, is admissible. *McAllister v. Rowland*, 124 Minn. 27, 144 N. W. 412, Ann. Cas. 1915B, 1006.

⁷⁶ *In re Mulholland's Estate*, 217 Pa. 65, 66 Atl. 150.

Evidence of such a decree rendered six months after testator had executed his will was held inadmissible in *Watson's Ex'r v. Watson* (1909) 137 Ky. 25, 121 S. W. 626.

⁷⁷ *Clifford v. Taylor*, 204 Mass. 358, 90 N. E. 862; *In re Cowdry's Will*, 77 Vt. 359, 60 Atl. 141, 3 Ann. Cas. 70.

⁷⁸ *Murphree v. Senn*, 107 Ala. 424, 18 South. 264.

⁷⁹ *Id.*

⁸⁰ *Prather v. McClelland* (Tex. Civ. App.) 26 S. W. 657.

⁸¹ *Packham v. Glendmeyer*, 103 Md. 416, 68 Atl. 1048; *Sewall v. Robbins*, 139 Mass. 164, 29 N. E. 650 (and this though the evidence shows that there was no material change in her condition between the execution of the two instruments).

⁸² *Ray v. Ray*, 98 N. C. 566, 4 S. E. 526.

⁸³ *Wood v. Carpenter*, 166 Mo. 465, 66 S. W. 172.

⁸⁴ *Titus v. Gage*, 70 Vt. 13, 39 Atl. 246.

⁸⁵ *In re Hine*, 68 Conn. 551, 37 Atl. 384.

⁸⁶ *Shirley v. Ezell*, 180 Ala. 352, 60 South. 905.

and immoral,⁸⁷ or whether or not testator was truthful and honest,⁸⁸ and where a will is contested on the ground of testamentary incapacity induced by a belief in spiritualism, evidence of the truth or falsity of spiritualistic faith is inadmissible.⁸⁹

OPINION EVIDENCE

50. (a) The witnesses to the execution of a will may state their opinion as to the testator's mental condition, without setting forth any facts upon which such opinion is based.
- (b) Experts in mental diseases, who have had opportunities for personal observation, may express an opinion as to the testator's mental condition, without stating the facts on which it is based, or they may give an opinion in regard thereto, based upon the whole evidence, if there is no conflict, or in answer to hypothetical questions, based upon the assumed existence of facts of which there is evidence in the case.
- (c) One not expert in mental diseases, after stating the facts upon which his opinion is based, may, as a general rule, express an opinion as to the testator's mental condition, if the facts as stated warrant the forming of an opinion. On principle, it should not be necessary that the facts observed precede a statement of opinion by a non-expert witness and in some jurisdictions, this requirement has been expressly negated.

Opinion of Witnesses

In legal theory, witnesses are placed about the testator, among other purposes, for bearing witness to his capacity, and it is presumed that they will satisfy themselves with regard to it before attesting the will.⁹⁰ Hence it is the universal rule that such witnesses may give their opinion on this matter, regardless of its foundation, or lack of foundation in fact, or in opportunity for observation.⁹¹ But they may be examined as to such facts,⁹² and, in case

⁸⁷ *Snell v. Weldon*, 239 Ill. 279, 87 N. E. 1022.

⁸⁸ *Wallace v. Whitman*, 201 Ill. 59, 66 N. E. 311.

⁸⁹ *O'Dell v. Goff*, 149 Mich. 152, 112 N. W. 736, 10 L. R. A. (N. S.) 989, 119 Am. St. Rep. 662.

⁹⁰ *Williams v. Spencer*, 150 Mass. 346, 23 N. E. 105, 5 L. R. A. 790, 15 Am. St. Rep. 206; *Hastings v. Rider*, 99 Mass. 624; *Appleby v. Brock*, 76 Mo. 314.

⁹¹ *Duffield v. Morris' Ex'r*, 2 Har. (Del.) 375; *Scott v. McKee*, 105 Ga. 256, 31 S. E. 183; *Robinson v. Adams*, 62 Me. 369, 16 Am. Rep. 473; *Cilley v. Oil-*

⁹² *Denning v. Butcher*, 91 Iowa, 425, 59 N. W. 69; *Jones v. Collins*, 94 Md. 403, 51 Atl. 398.

it appears that the previously expressed opinion is without substantial foundation, it would, of course, have no weight with the jury.⁹³ In Massachusetts, however, where other non-experts are not allowed to give an opinion, a subscribing witness cannot testify as to an opinion formed in part from what he had seen and heard since the execution of the will, and in part from what he saw at the time.⁹⁴ The testator's sanity need not be proved by all the subscribing witnesses,⁹⁵ nor is the proponent limited to the testimony of such witnesses in making out his prima facie case.⁹⁶ Such a witness cannot give an opinion as to the condition of the testator's mind, based upon his own testimony before the jury, where he has testified to no facts tending to show unsoundness of mind.⁹⁷ Neither are the declarations of a deceased attesting witness as to the capacity of the testatrix admissible.⁹⁸

While the subscribing witnesses may testify against the capacity of the testator, such testimony is viewed with suspicion, in view of their solemn attestation of the will, and is entitled to little weight.⁹⁹

ley, 34 Me. 162; Townshend v. Townshend, 7 Gill (Md.) 10; May v. Bradlee, 127 Mass. 414; Hastings v. Rider, 99 Mass. 624; Brooks v. Barrett, 7 Pick. (Mass.) 94; Beaubien v. Clcotte, 12 Mich. 459; Appleby v. Brock, 76 Mo. 314; Hardy v. Merrill, 56 N. H. 227, 22 Am. Rep. 441; Turner v. Cheesman, 15 N. J. Eq. 243; Clapp v. Fullerton, 34 N. Y. 190, 90 Am. Dec. 681; Dewitt v. Barley, 9 N. Y. 371; Logan v. McGinnis, 12 Pa. 27; Kaufman v. Caughman, 49 S. C. 159, 27 S. E. 16, 61 Am. St. Rep. 808; Gibson v. Gibson, 9 Yerg. (Tenn.) 329; Wigmore on Evidence, § 1936.

⁹³ Turner v. Cheesman, 15 N. J. Eq. 243; Stevens v. Van Cleve, 4 Wash. C. C. 262, Fed. Cas. No. 13,412.

⁹⁴ Williams v. Spencer, 150 Mass. 346, 23 N. E. 105, 5 L. R. A. 790, 15 Am. St. Rep. 206.

Neither can a witness to a codicil express an opinion as to whether the testatrix had sufficient strength of mind to comprehend the residuary clause of her will, which the codicil purported to affirm. Melaney v. Morrison, 152 Mass. 473, 26 N. E. 36. See, also, In re McCarthy, 55 Hun, 7, 8 N. Y. Supp. 578.

The subscribing witness should be examined as to the opinion which he held at the time of the execution of the will. In re Will of Ingalls, 148 Ill. 287, 35 N. E. 743; Robinson v. Adams, 62 Me. 369, 16 Am. Rep. 473.

⁹⁵ Kaufman v. Caughman, 49 S. C. 159, 27 S. E. 16, 61 Am. St. Rep. 808.

⁹⁶ Ashworth v. McNamee, 18 Colo. App. 85, 70 Pac. 156.

⁹⁷ Furlong v. Carraher, 108 Iowa, 492, 79 N. W. 277.

⁹⁸ Sewall v. Robbins, 139 Mass. 164, 29 N. E. 650; Sellars v. Sellars, 2 Heisk. (Tenn.) 430.

⁹⁹ Stevens v. Leonard, 154 Ind. 67, 56 N. E. 27, 77 Am. St. Rep. 446; Chappell v. Trent, 90 Va. 849, 19 S. E. 314. See, also, Loughney v. Loughney, 87 Wis. 92, 58 N. W. 250; Southworth v. Southworth (1903) 173 Mo. 59, 73 S. W. 129. Contra! In re D'Avignon's Will, 12 Colo. App. 489, 55 Pac. 936.

Declarations alleged to have been made by the subscribing witnesses, made out of court, that the testator was incompetent, but denied by them, can be shown only for the purpose of impeaching their testimony, and not to show

The evidence of attesting witnesses is, of itself, entitled to no greater weight than that of any other person who is qualified to express an opinion.¹

Opinion of Experts

An expert on mental diseases may give his opinion as to the mental condition of the testator, if he has had opportunity, by personal observation, to form such an opinion,² or, upon the whole evidence in the case, if it be not conflicting and he is present at the trial,³ or upon hypothetical questions, based upon facts of whose existence evidence has been produced.⁴ The preliminary question as to whether a witness is an expert is for the court.⁵ A physician who has made a special study of mental diseases is an expert for this purpose, and so, according to the prevailing rule, is a physician in general practice.⁶ Such is certainly the case with an attending physician.⁷ When an opinion is called for in answer to a hypothetical question, the inquiry should be as to the state of mind indicated by the facts assumed.⁸ The question should be so framed as to re-

what their opinions actually were, or to prove directly the incapacity of the testatrix. *Stirling v. Stirling*, 64 Md. 138, 21 Atl. 273.

¹ *Appeal of Crandall*, 63 Conn. 365, 28 Atl. 531, 38 Am. St. Rep. 375.

² *Carpenter v. Calvert*, 83 Ill. 62; *Blake v. Rourke*, 74 Iowa, 519, 38 N. W. 392; *Inhabitants of Fayette v. Inhabitants of Chesterville*, 77 Me. 28, 52 Am. Rep. 741; *Crockett v. Davis*, 81 Md. 134, 31 Atl. 710; *Lange v. Wiegand*, 125 Mich. 647, 85 N. W. 109; *McHugh v. Fitzgerald*, 103 Mich. 21, 61 N. W. 354; *In re Darragh*, 52 Hun, 591, 610, 5 N. Y. Supp. 58; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668.

³ *Com. v. Rogers*, 7 Metc. (Mass.) 500, 41 Am. Dec. 458; *Schnelder v. Manning*, 121 Ill. 376, 12 N. E. 267.

⁴ *Meeker v. Meeker*, 74 Iowa, 352, 37 N. W. 773, 7 Am. St. Rep. 489; *In re Norman's Will*, 72 Iowa, 84, 33 N. W. 374; *Howes v. Colburn*, 165 Mass. 385, 43 N. E. 125; *Kempsey v. McGinniss*, 21 Mich. 123; *Lester v. Town of Pittsford*, 7 Vt. 158; 1 Underhill, Wills, § 100.

⁵ 1 Greenl. Ev. (15th Ed.) § 440, note c.

⁶ *Tullis v. Kidd*, 12 Ala. 650; *In re Mullin's Estate*, 110 Cal. 252, 42 Pac. 645; *Appeal of Barber*, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90; *In re Fenton's Will*, 97 Iowa, 192, 66 N. W. 99; *McHugh v. Fitzgerald*, 103 Mich. 21, 61 N. W. 354; *Mendum v. Commonwealth*, 6 Rand. (Va.) 704; *Foster's Ex'rs v. Dickerson*, 64 Vt. 233, 24 Atl. 253.

⁷ *Hall v. Perry*, 87 Me. 569, 33 Atl. 160, 47 Am. St. Rep. 352.

⁸ A person who has made a special study of mental diseases may testify as an expert, though he be not regularly trained as a physician. See *Toomes' Estate*, 54 Cal. 509, 35 Am. Rep. 83, holding that a priest who had thus studied and applied learning in determining the mental status of those applying for absolution was an expert. It may be doubted, however, whether a person without considerable knowledge of the structure of the body, and of the relation of its conditions to those of the mind, should, as a rule, be allowed to qualify as an expert.

⁹ Various forms have been approved. "If certain facts (assumed by the question to be established by the evidence) should be found true by the jury,

quire the witness to state the degree of the testator's intelligence or imbecility in his own language, and in such form as will best convey his idea of the matter.⁹ No witness can be properly asked whether, in his opinion, the testator had sufficient capacity to make a will.¹⁰ The question is plainly objectionable as calling for an opinion on a question of law. It has occasionally been allowed, however.¹¹

A hypothetical question may be based upon the evidence brought forth at the trial, or upon such evidence together with facts which have come under the personal observation of the expert and which he has stated to the jury.¹² But the opinion must be bottomed on these alone. It cannot rest upon representations made to the witness by others, such as nurses and other physicians in regular attendance upon the testator.¹³

The question must call for an opinion as to the testator's mental condition at the time the will was made, or at a time sufficiently proximate thereto to render his state at the latter time relevant to that at the time of executing the will.¹⁴ It must also relate to matters which are legitimate subjects for expert evidence, viz., such as study, observation, and investigation may peculiarly qualify one to speak upon. Hence a question whether a change in the testator's lifelong purpose to provide for a sister, occurring on his deathbed,

what would be his opinions upon the facts thus found true, on the question of soundness of mind?" *Woodbury v. Obear*, 7 Gray (Mass.) 467.

"Assuming the jury find the facts as testified to by a certain witness, or by all the witnesses, when there is no conflict in the testimony, whether in the opinion of the witness the prisoner was insane; and what was the nature and character of the insanity indicated; what state of mind such facts indicated." *Shaw, O. J., in Com. v. Rogers*, 7 Metc. (Mass.) 500, 41 Am. Dec. 458. So the testimony of a medical expert that, from a medical standpoint, the testator was of unsound mind, is admissible. *Schneider v. Manning*, 121 Ill. 376, 12 N. E. 267.

⁹ *Crowell v. Kirk*, 14 N. C. 355; *Fairchild v. Bascomb*, 35 Vt. 398.

¹⁰ *Walker v. Walker's Ex'r*, 34 Ala. 469; *Schneider v. Manning*, 121 Ill. 376, 12 N. E. 267; *Hall v. Perry*, 87 Me. 569, 33 Atl. 160, 47 Am. St. Rep. 352; *Buy's v. Buys*, 99 Mich. 354, 58 N. W. 331; *Hewlett v. Wood*, 55 N. Y. 634; *HOPKINS v. WHEELER*, 21 R. I. 533, 45 Atl. 551, 79 Am. St. Rep. 819, *Dunmore Cas. Wills*, 70; *Gibson v. Gibson*, 9 Yerg. (Tenn.) 329; *Brown v. Mitchell*, 88 Tex. 350, 31 S. W. 621, 36 L. R. A. 64; *In re Blood's Will*, 62 Vt. 359, 19 Atl. 770. See *Wigmore on Evidence*, § 1937.

¹¹ See *McHugh v. Fitzgerald*, 103 Mich. 21, 61 N. W. 354. *Ethridge v. Bennett*, 9 Houst. (Del.) 295, 31 Atl. 813.

¹² *Foster's Ex'rs v. Dickerson*, 64 Vt. 233, 24 Atl. 253.

¹³ *Heald v. Thing*, 45 Me. 392.

¹⁴ *Denning v. Butcher*, 31 Iowa, 425, 59 N. W. 69; *Lange v. Wiegand*, 125 Mich. 647, 85 N. W. 109.

and without apparent reason, indicates any change in his intellect, is not one for the opinion of experts.¹⁵

It has been said that the testimony of experts is entitled to more weight than that of other witnesses upon the question of mental soundness,¹⁶ and to less.¹⁷ It should, however, be left to the jury to give the testimony what weight they please.¹⁸

Opinions of Non-Experts

By the weight of authority, a non-expert witness, other than a subscribing witness to the will, after stating his opportunities for observation, and the facts upon which his conclusion is based,¹⁹ may, if, in the view of the court, the facts justify the formation of an opinion,²⁰ state his opinion as to the mental condition of the testator at the time of executing the will.²¹ The rule is otherwise in Massachusetts²² and several other states.²³

¹⁵ *Stockton v. Thorn*, 39 Minn. 204, 39 N. W. 143.

¹⁶ *Meeker v. Meeker*, 74 Iowa, 352, 37 N. W. 773, 7 Am. St. Rep. 489.

¹⁷ *In re Kiedalsch*, 2 Con. Sur. 438, 13 N. Y. Supp. 255.

¹⁸ *Watson v. Anderson*, 13 Ala. 202; *Durham v. Smith*, 120 Ind. 463, 22 N. E. 333; *Cline v. Lindsey*, 110 Ind. 337, 11 N. E. 441.

They may properly give it more. *Blake v. Rourke*, 74 Iowa, 519, 38 N. W. 392. Sometimes the testimony of nonexperts, in view of all the facts, is manifestly sufficient to overcome it. See *In re Lawrence's Will*, 27 Misc. Rep. 473, 59 N. Y. Supp. 174; *In re Connor's Will*, 29 Misc. Rep. 391, 61 N. Y. Supp. 910; *Hagan v. Sone*, 68 App. Div. 60, 74 N. Y. Supp. 109; *In re Conaty*, 26 Misc. Rep. 104, 56 N. Y. Supp. 854; *In re Lyddy's Will (Sur.)* 4 N. Y. Supp. 468; *In re Seagrist's Will*, 1 App. Div. 615, 37 N. Y. Supp. 496.

¹⁹ *Burney v. Torrey*, 100 Ala. 157, 14 South. 685, 46 Am. St. Rep. 33; *Murphree v. Senn*, 107 Ala. 424, 18 South. 264; *Dunham's Appeal*, 27 Conn. 192; *Zirkle v. Leonard* (1900) 61 Kan. 636, 60 Pac. 318; *Lamb v. Lippincott*, 115 Mich. 611, 73 N. W. 887; *Matter of Vanauken*, 10 N. J. Eq. 186; *Lamb v. Lynch*, 56 Neb. 135, 76 N. W. 428; *In re Hoopes' Estate*, 174 Pa. 373, 34 Atl. 603.

If the facts testified to do not indicate incapacity, the witness is incompetent to give an opinion. *Buys v. Buys*, 99 Mich. 354, 58 N. W. 331.

A witness may testify that a person is sane, without giving his reasons for his opinion. *State v. Soper* (1899) 148 Mo. 217, 49 S. W. 1007.

²⁰ *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Carpenter v. Hatch*, 64 N. H. 573, 15 Atl. 219; *Clary's Adm'rs v. Clary*, 24 N. C. 78; *O'Connor v. Madison*, 98 Mich. 183, 57 N. W. 105; *Foster's Ex'rs v. Dickerson*, 64 Vt. 233, 24 Atl. 253.

A single interview has sometimes been held to afford sufficient grounds for observation to justify the reception of an opinion formed as a result of it. See *Ethridge v. Bennett*, 9 Houst. (Del.) 295, 31 Atl. 813; *In re Fenton's Will*, 97 Iowa, 192, 66 N. W. 99.

²¹ *Burney v. Torrey*, 100 Ala. 157, 14 South. 685, 46 Am. St. Rep. 33; *Bulger v. Ross*, 98 Ala. 267, 12 South. 803; *Appeal of Shanley*, 62 Conn. 325, 25 Atl. 245; *Petefish v. Becker*, 176 Ill. 448, 52 N. E. 71; *Keithley v. Stafford*, 126

²² See note 22 on following page.

²³ See note 23 on following page.

Although the courts usually require that the non-expert witness first state the facts or grounds on which his opinion is based, there seems to be no good reason why this requirement should be made,²⁴ and some jurisdictions make no such requirement.²⁵

If the witness' opportunities for observation are adequate, but the facts observed are such that he cannot describe them accurately, he may still express his opinion.²⁶ Non-expert opinion evidence, in this connection, is sometimes limited by statute to that of intimate friends.²⁷

Testimony as to facts and circumstances tending to establish insanity is still competent, although the opinion of the witness is not asked regarding the testator's sanity.²⁸ An opinion founded upon a provision of the will itself is inadmissible.²⁹

Ill. 507, 18 N. E. 740; *Ethridge v. Bennett*, 9 Houst. (Del.) 295, 31 Atl. 813; *Blake v. Rourke*, 74 Iowa, 519, 38 N. W. 392; *In re Goldthorp's Estate*, 94 Iowa, 336, 62 N. W. 845, 58 Am. St. Rep. 400; *In re Norman's Will*, 72 Iowa, 84, 33 N. W. 374; *Meeker v. Meeker*, 74 Iowa, 352, 37 N. W. 773, 7 Am. St. Rep. 489; *Overall v. Bland* (Ky.) 12 S. W. 273; *Commonwealth Title Ins. & Trust Co. v. Gray*, 150 Pa. 255, 24 Atl. 640; *Whitelaw's Ex'r v. Sims*, 90 Va. 588, 19 S. E. 113.

²² *Smith v. Smith*, 157 Mass. 389, 32 N. E. 348. Nonexpert witnesses, aside from the witnesses to the will, are permitted, in this jurisdiction, to testify to the appearance of the testator; to any particular facts from which the state of his mind might be inferred; to apparent changes in the testator's intelligence and understanding; to a want of coherence in his remarks, etc.; but they cannot testify as to their opinion or judgment regarding his mental condition. See *Poole v. Richardson*, 3 Mass. 330; *Buckminster v. Perry*, 4 Mass. 593; *Dickinson v. Barber*, 9 Mass. 225, 6 Am. Dec. 58; *Needham v. Ide*, 5 Pick. (Mass.) 510; *Barker v. Comins*, 110 Mass. 477; *Nash v. Hunt*, 116 Mass. 237.

Such, also, is apparently the rule in Maine (*Wyman v. Gould*, 47 Me. 159. See, however, *Robinson v. Adams*, 62 Me. 369, 16 Am. Rep. 473) and Texas (*Gehrke v. State*, 13 Tex. 568).

²³ See Wigmore on Ev. § 1938, where cases collected showing state of law in all American jurisdictions.

²⁴ "All that needs to appear in advance is that he had an opportunity to observe and did observe, whereupon it is proper for him to state his conclusions, leaving the detailed grounds to be drawn out on cross-examination." Wigmore on Ev. § 1922.

²⁵ *State v. Lewis*, 20 Nev. 333, 22 Pac. 241; *Garrison v. Blanton*, 48 Tex. 299; Wigmore on Ev. § 1935.

²⁶ *Newcomb's Ex'r v. Newcomb*, 96 Ky. 120, 27 S. W. 997; *Prentiss v. Bates*, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494.

²⁷ Code Civ. Proc. Cal. § 1870.

The question as to whether a witness is an intimate acquaintance is largely within the discretion of the trial court. *In re Wax's Estate*, 106 Cal. 343, 39 Pac. 624. But the exercise of this discretion may constitute reversible error. *In re Carpenter's Estate*, 79 Cal. 382, 21 Pac. 835.

²⁸ *Bower v. Bower*, 142 Ind. 194, 41 N. E. 523.

²⁹ *Commonwealth Title Ins. & Trust Co. v. Gray*, 150 Pa. 255, 24 Atl. 640.

Form of Question

Aside from the fact that no hypothetical question can be put to a non-expert witness, the form of question regarding the testator's capacity is much the same as in the case of expert witnesses.²⁰

²⁰ See ante, p. 128.

A witness may state whether certain transactions of the testator impressed him as rational or irrational (*In re Folts' Will*, 71 Hun, 492, 24 N. Y. Supp. 1052; *Petrie v. Petrie*, 53 Hun, 638, 6 N. Y. Supp. 831); and he may compare the mind of the testatrix with that of an average child seven or eight years old (*Appeal of Richmond*, 59 Conn. 226, 22 Atl. 82, 21 Am. St. Rep. 85). The witness may be asked as to any of the necessary requisites of testamentary capacity, without being asked as to them all (*Reed v. Lilly's Ex'r* [Ky.] 23 S. W. 955); and he may testify that, in his business relations, the testator acted like a rational man (*In re Wax's Estate*, 106 Cal. 343, 39 Pac. 624). So he may state that the testator was "childish," and his expression "simple" (*Burney v. Torrey*, 100 Ala. 157, 14 South. 685, 46 Am. St. Rep. 33); and what was the condition of the testator's mind, memory, and judgment (*Craig v. Southard*, 148 Ill. 37, 35 N. E. 361).

He cannot testify to the fact that the testator was incompetent to transact business (*Brackney v. Fogle*, 156 Ind. 535, 60 N. E. 303; *Trubey v. Richardson*, 224 Ill. 136, 79 N. E. 592); nor that he was incapable of making contracts or a will (*St. Joseph's Convent of Mercy v. Garner*, 66 Ark. 623, 53 S. W. 298); nor that the testator conducted a case "well and shrewdly" (*Stasser v. Hogan*, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990).

For other cases, see Wigmore on Ev. § 1958, n. 1.

CHAPTER VI

RESTRAINT UPON POWER OF TESTAMENTARY DISPOSITION—WHO
MAY BE BENEFICIARIES—WHAT MAY BE DIS-
POSED OF BY WILL

- 51. The Rule Against Perpetuities.
- 52. Statutes Against Suspension of Power of Alienation.
- 53-54. Who may be Beneficiaries.
- 55. What may be Disposed of by Will.

THE RULE AGAINST PERPETUITIES

51. The power of a testator to dispose of his property as he will is limited by the common-law rule against perpetuities. This rule, as applied to wills, is that no interest is good unless it must vest, if at all, within twenty-one years after the termination of lives which are in being at the death of the testator.

With variations in its wording, the above is generally recognized as a correct statement of the common-law rule¹ as applied to wills. Periods of gestation are excluded in computing the time within which future interests must vest.² The rule applies equally to equitable and legal estates, to instruments executing powers as well as to other instruments,³ and to interests in both realty and personalty.⁴

A gift to the lineal descendants of the testator's grandchildren, in case the testator's daughter should die leaving issue;⁵ or a gift to grandchildren contingent on their reaching a certain age;⁶ or a

¹ Gray, Rule against Perpetuities (2d Ed.) § 201; *Owsley v. Harrison*, 190 Ill. 235, 60 N. E. 89; *Hale v. Hale*, 125 Ill. 399, 17 N. E. 470; *Pulitzer v. Livingston*, 89 Me. 359, 36 Atl. 635; *ANDREWS v. LINCOLN*, 95 Me. 541, 50 Atl. 898, 56 L. R. A. 103, *Dunmore Cas. Wills*, 72; *Brattle Square Church v. Grant*, 3 Gray (Mass.) 142, 152, 63 Am. Dec. 725; *Chilcott v. Hart*, 23 Colo. 40, 45 Pac. 391, 35 L. R. A. 41; *Becker v. Chester*, 115 Wis. 90, 91 N. W. 87, 650; *In re Lowman* [1895] 2 Ch. 348.

² Gray, Rule against Perpetuities (2d Ed.) § 220.

³ *Pulitzer v. Livingston*, 89 Me. 359, 36 Atl. 635.

⁴ Gray, Rule against Perpetuities (2d Ed.) § 202; *In re Walkerly*, 108 Cal. 627, 41 Pac. 772, 49 Am. St. Rep. 97.

⁵ *Stone v. Bradlee*, 183 Mass. 165, 66 N. E. 708. Semble: *Stout v. Stout*, 44 N. J. Eq. 479, 15 Atl. 843.

⁶ *Eldred v. Meek*, 183 Ill. 26, 55 N. E. 536, 75 Am. St. Rep. 86. Semble: *ANDREWS v. LINCOLN*, 95 Me. 541, 50 Atl. 898, 56 L. R. A. 103, *Dunmore Cas. Wills*, 72; *Lawrence v. Smith*, 163 Ill. 149, 45 N. E. 259.

devise of land in trust, to be used by a certain party and her lineal descendants for 200 years, then over;⁷ or the creation of an absolute estate in the heirs of the testator's son, the distribution to be had after the death of the son and of his children, including those born after as well as those living at the testator's death;⁸ or a devise to the first son of A who attains twenty-five (A having no son of that age at testator's death),⁹—furnish obvious instances of the violation of the rule.

Rule Does Not Apply to Vested Interests

From its very statement, it is evident that the rule does not apply to vested interests;¹⁰ i. e., to reversions, vested remainders, and interests in personalty analogous thereto.¹¹ Hence a devise to trustees, to hold and manage for 75 years, and annually to pay the income to the testator's children, is valid; since both the legal and equitable estates are vested at once,¹² as is also a devise to a trustee, to pay the incumbrances upon the property from the income, and, when entirely free, to the testator's son.¹³ And where a residuary clause provided that, "as a condition of the vesting of this legacy," the residuary legatee should release certain claims, it was held that a present estate was intended, the condition merely requiring the execution of the release upon the legatee's being put in possession, and that the clause was not, therefore, objectionable as creating a perpetuity by a condition precedent.¹⁴

It follows that an estate which, though at the time of its origin a contingent remainder or an executory devise, must, to take effect at all, become vested within twenty-one years after lives in being, is valid.¹⁵ Thus the rule against perpetuities is not offended by a devise in trust, the net income to be paid to the testator's daughters for life, and at their decease to be divided among their then living

⁷ *Hanley v. Coal Co.* (C. C.) 110 Fed. 62.

⁸ *In re Gerber's Estate*, 196 Pa. 366, 46 Atl. 497.

⁹ *Abbliss v. Burney*, 17 Ch. Div. 211.

¹⁰ *ANDREWS v. LINCOLN*, 95 Me. 541, 50 Atl. 898, 56 L. R. A. 103, *Dunmore Cas. Wills*, 72; *Pulitzer v. Livingston*, 89 Me. 359, 36 Atl. 635; *Appeal of Appleton*, 136 Pa. 354, 20 Atl. 521, 11 L. R. A. 85, 20 Am. St. Rep. 925.

A vested interest after a lease for 999 years was held valid in *Todhunter v. D. M., I. & M. R. Co.*, 58 Iowa, 205, 12 N. W. 267.

¹¹ Gray, *Rule against Perpetuities* (2d Ed.) § 205.

¹² *In re Johnston's Estate*, 185 Pa. 179, 39 Atl. 879, 64 Am. St. Rep. 621. *Semble*: *Welser v. Zeigler*, 192 Pa. 394, 43 Atl. 997.

¹³ *MORGAN v. MORGAN*, 20 R. I. 600, 40 Atl. 736, *Dunmore Cas. Wills*, 75.

¹⁴ *Congregational Church Bldg. Soc. v. Everett*, 85 Md. 79, 36 Atl. 654, 35 L. R. A. 693, 60 Am. St. Rep. 308.

¹⁵ Gray, *Rule against Perpetuities* (2d Ed.) § 206; *Madison v. Larmon*, 170 Ill. 65, 48 N. E. 556, 62 Am. St. Rep. 356; *In re Lennig's Estate*, 154 Pa. 209, 25 Atl. 1049.

children;¹⁶ nor by a devise to an unmarried son "and his wife, if he should marry, and after their decease, to his children";¹⁷ nor by a devise, the income to be paid to a daughter for life, the trustees to convey the fee to the appointees of her will;¹⁸ nor to a remainder over to the legal heirs of the tenant for life;¹⁹ nor to the devise of a fee to the unborn children of the testator's son.²⁰

Where an estate is given with limitation over upon the death of the first taker without issue, the failure of issue is now generally regarded as referring to a definite failure of issue during the life of the first taker,²¹ and hence the limitation over does not offend the rule against perpetuities.²² Even if an indefinite failure of issue is intended, where gift is of realty, the taker has an estate tail to remainders on which the rule against perpetuities does not apply.²³

The Future Estate Must Vest Within the Time Specified

It is not enough that the future estate may or is very likely to vest within the specified time. It must, beyond all peradventure, so vest; otherwise it offends the rule and is void;²⁴ as where the limitation is made to take effect when the estate shall cease to be used for a certain purpose.²⁵ Such is the case with a devise to a daughter for life, and upon her death to her children in fee, but if the children, or either of them, should die without issue in the lifetime of any husband of the daughter, then to the heirs of the testator; for, although at the time of the testator's death the daughter might have a husband living, there is the possibility of her contracting, in case of his death, a marriage with a person not in being

¹⁶ In re Siddall's Estate, 180 Pa. 127, 36 Atl. 570; Beeks v. Rye, 77 Miss. 358, 27 South. 635.

¹⁷ Gates v. Selbert, 157 Mo. 254, 57 S. W. 1065, 80 Am. St. Rep. 625.

¹⁸ Appeal of Appleton, 136 Pa. 354, 20 Atl. 521, 11 L. R. A. 85, 20 Am. St. Rep. 925. Semble: Woodbridge v. Winslow, 170 Mass. 388, 49 N. E. 738.

¹⁹ Healy v. Healy, 70 Conn. 467, 39 Atl. 793.

²⁰ Chapman v. Cheney, 191 Ill. 574, 61 N. E. 363. In this will it was further provided that no grandchild should acquire any interest unless he should reach the age of 30; but this was regarded as creating a condition subsequent, the grandchildren taking a determinable fee.

²¹ See post, p. 451.

²² Metzen v. Schopp (1903) 202 Ill. 275, 67 N. E. 36; Selman v. Robertson, 46 S. C. 262, 24 S. E. 187; Armstrong v. Douglass, 89 Tenn. 219, 14 S. W. 604, 10 L. R. A. 85.

²³ Gray on Perpetuities (2d Ed.) § 212.

²⁴ Johnson v. Preston, 226 Ill. 447, 80 N. E. 1001, 10 L. R. A. (N. S.) 564; ANDREWS v. LINCOLN, 95 Me. 541, 50 Atl. 898, 56 L. R. A. 103, Dunmore Cas. Wills, 72; Brattle Square Church v. Grant, 3 Gray (Mass.) 142, 155, 63 Am. Dec. 725; Society for Promoting Theological Education v. Attorney General, 135 Mass. 285, 288; Hanley v. Coal Co. (C. C.) 110 Fed. 62.

²⁵ Brattle Square Church v. Grant, 3 Gray (Mass.) 142, 63 Am. Dec. 725.

when the testator died, in consequence of which the devise over to the heirs might not take effect during a life in being at the testator's death.²⁶

In determining whether the contingency will happen within the required limits, both men and women are presumed capable of reproduction as long as they live, and the fact of their not being physically capable of this function will not render a limitation valid which would otherwise be void for remoteness.²⁷

Future interests may be alienable and still be void as too remote, if they do not necessarily vest within the time limited by the rule.²⁸ Accordingly, where property was given to trustees to hold upon trusts which might not vest within the time limited by the rule such trusts were void, although trustees were given full power to change investments so that property was at all times alienable.²⁹

Vesting Suspended for a Term of Years

Whenever lives in being do not form any part of the time of postponement, but the vesting is suspended for a term of years, such term cannot exceed twenty-one years,³⁰ and an estate limited to vest at the expiration of a longer period is void,³¹ as in the case of the devise of a remainder to testator's children that may be living seventy-five years after his death, and to the legal descendants of any of his children then dead.³² This follows inevitably from the requirement that the estate shall surely vest within the period indicated by the rule. For while the estate, whose vesting is suspended for a term not largely in excess of twenty-one years, will in all probability vest actually within what would have been the required period, had regard been had to existing lives, yet the possibility of its not thus vesting is apparent enough. But a devise in trust for twenty-five years is not within the rule, where the trust was to expire on the beneficiary's death, and the estate was then to be distributed among the testator's heirs.³³

²⁶ *Sears v. Russell*, 8 Gray (Mass.) 86, 98, 99.

²⁷ *Jee v. Andley*, 1 Cox, Ch. 324. See, also, *Stout v. Stout*, 44 N. J. Eq. 479, 15 Atl. 843.

²⁸ *Winsor v. Mills*, 157 Mass. 862, 32 N. E. 352; Gray, *Rule against Perpetuities* (2d Ed.) § 268.

²⁹ *Wheeler v. Fellowes*, 52 Conn. 238.

³⁰ *ANDREWS v. LINCOLN*, 95 Me. 541, 50 Atl. 898, 56 L. R. A. 103, *Dunmore Cas. Wills*, 72.

³¹ *In re Walkerly's Estate*, 108 Cal. 627, 41 Pac. 772, 49 Am. St. Rep. 97 (after twenty-five years); *Eldred v. Meek*, 183 Ill. 26, 55 N. E. 536, 75 Am. St. Rep. 86; *Siedler v. Syms*, 56 N. J. Eq. 275, 38 Atl. 424.

³² *In re Johnston's Estate*, 185 Pa. 179, 39 Atl. 879, 64 Am. St. Rep. 621.

³³ *McClelland v. McClelland* (Tex. Civ. App.) 37 S. W. 350.

Remoteness to be Determined with Reference to Testator's Death

It is now well settled that the question as to whether the provisions of a will offend the rule against perpetuities is to be determined with reference to the situation at the time of the testator's death, and not with regard to the time when the will was executed.³⁴

Alternative Contingencies

If an estate is given over on one contingency, which must happen, if at all, within the rule, and that contingency does happen, the validity of the gift will not be affected by the fact that there was an alternative disposition which is void for remoteness.³⁵ Thus, where the income of a trust estate is given to the testator's son for life, and, upon his death without surviving children, then to a charity, but, if there are surviving children, the income to be paid to them for life, and the principal then to go to the charity, the bequest to the charity will be regarded as valid in event of the son's dying without surviving children, though in the second contingency it is obviously too remote.³⁶

Separable Limitations

Where successive gifts are made, some of which offend the rule against perpetuities, while others do not, and the valid and invalid gifts are not so closely connected as to make it manifest that the testator intended that all should stand or fall together, the good will be separated from the bad, and the prior valid interests become what they would have been, had the subsequent invalid limitations been omitted.³⁷ A subsequent vested interest is never too remote, although preceded by other interests which are too remote.³⁸

Where a devise is given to a class of persons answering a given description, and any member of that class may possibly have to be ascertained at a period exceeding that allowed by the rule against perpetuities, the whole devise is void.³⁹

³⁴ *Hosea v. Jacobs*, 98 Mass. 65, 67; 1 Jar. Wills, 254; *Hale v. Hale*, 3 Ch. D. 643, 645. Gray, *Rule against Perpetuities* (2d Ed.) § 231.

³⁵ *Jackson v. Phillips*, 14 Allen (Mass.) 539, 572; *Halsey v. Goddard* (C. C.) 86 Fed. 25.

³⁶ *Jackson v. Phillips*, 14 Allen (Mass.) 539.

³⁷ *Haynes v. Sherman*, 51 Hun, 585, 4 N. Y. Supp. 413; *Dulany v. Middleton*, 72 Md. 67, 19 Atl. 146; *Chapman v. Cheney*, 191 Ill. 574, 61 N. E. 363. See *Saxton v. Webber*, 83 Wis. 617, 53 N. W. 905, 20 L. R. A. 509.

³⁸ "Thus if an estate is given (1) to A. for life, (2) to A.'s unborn son for life, (3) to the child of such unborn son for life, (4) to B. in fee, B.'s estate is good, although the remainder to the child of A.'s unborn child is too remote." Gray, *Rule against Perpetuities* (2d Ed.) § 251.

³⁹ *Eldred v. Meek*, 183 Ill. 26, 55 N. E. 536, 75 Am. St. Rep. 86; *Hills v. Simonds*, 125 Mass. 536, 539.

But if the gifts to the members of a class are separable, so that the amount of the gift to each member may be ascertained within the legal period, the gift to one member is not rendered invalid by reason of the fact that the gift to others may be too remote.⁴⁰

Gifts to Charities

Although a charitable trust is not invalid by reason of the fact that it is inalienable because there are no definite cestuis que trust to alien,⁴¹ such a trust may be invalid under the rule because too remote. Accordingly, if there is a gift to a charity to take effect only upon the happening of a contingency which may not occur within the legal period, and there is no preceding gift to another donee, the gift to the charity fails.⁴² If, however, there is a gift to a charity, with a gift over to another charity, the gift over to the second charity is good, even though it may not vest within the limits of the rule against perpetuities.⁴³ A gift to a corporation or association on a charitable trust is usually held valid, although no such corporation or association exists at the date of the gift.⁴⁴

Accumulations

In the absence of legislation to the contrary, a testator may lawfully provide for the accumulation of the income of property during the whole of the period within the rule against perpetuities.⁴⁵ A gift which vests within the required period is valid, though accompanied by a void direction for accumulation.⁴⁶ If, however, the provisions relative to the disposition of the principal and income of the fund are void, the directions to invest and accumulate are also void, as being auxiliary thereto.⁴⁷ When testator directs that in-

⁴⁰ *Albert v. Albert*, 68 Md. 352, 12 Atl. 11; Gray, *Rule against Perpetuities* (2d Ed.) § 389.

⁴¹ Gray, *Rule against Perpetuities* (2d Ed.) § 590.

⁴² *Jocelyn v. Nott*, 44 Conn. 55; *Brooks v. Belfast*, 90 Me. 318, 324, 38 Atl. 222; Gray on *Perpetuities* (2d Ed.) § 605.

⁴³ *Storrs Agricultural School v. Whitney*, 54 Conn. 342, 8 Atl. 141; *MacKenzie v. Jersey City Presbytery*, 67 N. J. Eq. 652, 61 Atl. 1027, 3 L. R. A. (N. S.) 227; *Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401.

⁴⁴ *Ingraham v. Ingraham*, 169 Ill. 432, 48 N. E. 561, 49 N. E. 320; *Chase v. Stockett*, 72 Md. 235, 19 Atl. 761; *Codman v. Brigham*, 187 Mass. 309, 72 N. E. 1008, 105 Am. St. Rep. 394; *Almy v. Jones*, 17 R. I. 265, 21 Atl. 616, 12 L. R. A. 414; *Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401; *Russell v. Allen*, 107 U. S. 163, 2 Sup. Ct. 327, 27 L. Ed. 397.

⁴⁵ *Odell v. Odell*, 10 Allen (Mass.) 1, 5; *Thorndike v. Loring*, 15 Gray (Mass.) 391; *St. Paul's Church v. Attorney General*, 164 Mass. 188, 203, 41 N. E. 231; *Boughton v. Boughton*, 1 H. L. C. 406. See *Duggan v. Slocum* (C. C.) 83 Fed. 244.

⁴⁶ *Odell v. Odell*, 10 Allen (Mass.) 1.

⁴⁷ *Fosdick v. Fosdick*, 6 Allen (Mass.) 41, 48; *ANDREWS v. LINCOLN*, 95 Me. 541, 50 Atl. 898, 56 L. R. A. 103, *Dunmore Cas. Wills*, 72.

come be accumulated for the payment of debts, such a direction is not void for remoteness, since creditors have a present interest and may stop the accumulation at any time.⁴⁸

Statutes have been passed in some jurisdictions curtailing the common-law rule, and limiting the period of accumulation to twenty-one years after the death of the testator, or during the minority of the beneficiaries.⁴⁹ Provisions for accumulation beyond the period fixed by statute are not void in toto, but only to the extent of the excess.⁵⁰

STATUTES AGAINST SUSPENSION OF POWER OF ALIENATION

52. The common-law rule against perpetuities has been replaced in many jurisdictions by the statutory requirement that the power of transferring the absolute title to property shall not be suspended beyond a certain period—ordinarily for not longer than the duration of two lives in being when the interest was created.

Occasionally statutes provide that the power of alienation shall not be suspended in excess of the period prescribed by the rule against perpetuities for the vesting of estates,⁵¹ but ordinarily legislation in this connection has taken the form above indicated.⁵² Un-

⁴⁸ *MORGAN v. MORGAN*, 20 R. I. 600, 40 Atl. 736, Dunmore Cas. Wills, 75. Gray, Rule against Perpetuities (2d Ed.) § 676.

⁴⁹ 39 & 40 Geo. III, c. 98; 1 Rev. St. N. Y. (1st Ed.) p. 726, part 2, c. 1, tit. 2, §§ 37, 38; How. Ann. St. Mich. 1882, c. 213, §§ 5553, 5554. These statutes are cited, from a number, as generally typical of legislation on this subject.

⁵⁰ *Hafner v. Hafner*, 171 N. Y. 633, 63 N. E. 1117; *Appeal of Brubaker* (Pa.) 15 Atl. 708.

⁵¹ Ky. St. 1915, § 2360. Construed in *Stevens v. Stevens* (Ky.) 54 S. W. 835; *Coleman v. Coleman* (Ky.) 65 S. W. 832.

Code Iowa 1897, § 2901. Construed in *Sioux City Terminal R. & Warehouse Co. v. Trust Co.*, 27 C. O. A. 73, 82 Fed. 124.

Civ. Code Cal. § 715, prohibiting the suspension of the power of alienation beyond the existence of lives in being. Construed in *Re Hendy's Estate*, 118 Cal. 656, 50 Pac. 753; *Crew v. Pratt*, 119 Cal. 139, 51 Pac. 38; *In re Cavarly's Estate*, 119 Cal. 406, 51 Pac. 629; *Blakeman v. Miller*, 136 Cal. 138, 68 Pac. 587, 89 Am. St. Rep. 120.

In Ohio it is provided that no estate shall be given, by deed or will, to any persons but such as are in being, or to the immediate issue or descendants of such as are in being at the time of making such deed or will. Gen. Code 1912, § 8622. The "time of making will" means the time at which the will takes effect by reason of the death of testator. *Phillips v. Herron*, 55 Ohio St. 478, 45 N. E. 720.

⁵² Among the statutes taking this form are Real Property Law N. Y. (Consol. Laws, c. 50; Laws 1909, p. 3381) § 42; How. Ann. St. Mich. 1913, § 10637; Gen. St. Minn. 1913, § 6665; Rev. St. Wis. 1898, § 2038.

der these statutes the question is not so much when the future estate vests, as when the power of alienation may be exercised. The lives during which the power is suspended must be in existence at the creation of the estate; i. e., in the case of a will, at the death of the testator.⁵³ A devise which suspends the power of alienation for a specific time, not measured by two lives in being, but by a prescribed term of years, is void,⁵⁴ as is also one in which the power of alienation is suspended for a number of lives in excess of the number allowed by statute.⁵⁵ A trust created to last during two lives in being is valid,⁵⁶ as is also a bequest in trust, to divide the income among three persons, and at the end of 10 years to distribute the principal among them, since the estate vested in the beneficiaries at the death of the testatrix.⁵⁷ In general, where the estate vests, but enjoyment only is postponed, the statute is not violated.⁵⁸ So the power of alienation is not suspended by a provision in a will giving the executor a power to sell in his discretion, without restriction as to time.⁵⁹

Statutes against suspension aim to prevent only a suspension of the power of alienation by the terms of the instrument and not such a suspension as arises from the disability of infancy, or from any other cause outside of the instrument.⁶⁰

⁵³ *Mullreed v. Clark*, 110 Mich. 229, 68 N. W. 138, 989.

⁵⁴ *Trowbridge v. Trowbridge*, 158 N. Y. 682, 52 N. E. 1126; *Haynes v. Sherman*, 117 N. Y. 433, 22 N. E. 938; *Underwood v. Curtis*, 127 N. Y. 523, 28 N. E. 585; *Fargo v. Squiers*, 154 N. Y. 250, 48 N. E. 509; *Kalish v. Kalish*, 166 N. Y. 368, 59 N. E. 917; *Farrand v. Petit*, 84 Mich. 671, 48 N. W. 156; *Fitz Gerald v. City of Big Rapids*, 123 Mich. 281, 82 N. W. 56; *State v. Holmes*, 115 Mich. 456, 73 N. W. 548.

⁵⁵ *Hooker v. Hooker*, 166 N. Y. 156, 59 N. E. 769; *Niles v. Mason*, 126 Mich. 482, 85 N. W. 1100 (where one-half the income of a trust fund was to be paid to a son for life; one-half to a daughter for life; on their deaths, to their issue, if any survive; on the death of either without issue, the income to go to the survivor for life, and then over, if both die without issue); *Trufant v. Nunneley*, 106 Mich. 554, 64 N. W. 469 (where a life estate in separate tracts of land was given to each of three children, with remainder over in each case to the bodily heirs of all such children, share and share alike); *Fowler v. Ingersoll*, 127 N. Y. 472, 28 N. E. 471.

⁵⁶ *Buchanan v. Little*, 154 N. Y. 147, 47 N. E. 970; *Mansbach v. New*, 170 N. Y. 585, 63 N. E. 1119; *Schermerhorn v. Cotting*, 131 N. Y. 48, 29 N. E. 980; *Allen v. Stevens*, 161 N. Y. 122, 55 N. E. 568. *Semble*: *Hughes v. Hughes*, 91 Wis. 138, 64 N. W. 851.

⁵⁷ *Hillyer v. Vandewater*, 121 N. Y. 681, 24 N. E. 999. *Semble*: *Wilber v. Wilber*, 165 N. Y. 451, 59 N. E. 264.

⁵⁸ *Quade v. Bertsch* (1903) 173 N. Y. 615, 66 N. E. 1115; *Wilber v. Wilber*, 165 N. Y. 451, 59 N. E. 264.

⁵⁹ *Fitz Gerald v. City of Big Rapids*, 123 Mich. 281, 82 N. W. 56; *Hope v. Brewer*, 136 N. Y. 126, 32 N. E. 558, 18 L. R. A. 453.

⁶⁰ *Beardsley v. Hotchkiss*, 96 N. Y. 201, 214.

WHO MAY BE BENEFICIARIES

53. As a general rule, any person may be a beneficiary under a will.

54. But there are certain limitations upon this principle arising from the character of the beneficiaries, which affect gifts to

- (a) Aliens;
- (b) Corporations;
- (c) Subscribing witnesses;
- (d) Beneficiaries rendered incompetent by considerations of public policy.

Broadly speaking, any person may take as beneficiary under a will. Such is the case with infants, habitual drunkards, and all persons non compos mentis. Here an acceptance of the gift, if beneficial, will be presumed.⁶¹ So a married woman, independent of statute, could take under a will, to her sole and separate use, and she might also be a beneficiary under her husband's will.⁶² But a devise or bequest to the "estate" of a person is void, since an estate is not a person or entity that can take under a will.⁶³

Bequests to Charity

Bequests for charitable purposes are as a rule, much favored by the law, and much less definiteness is required in the beneficiaries than in the case of an ordinary trust.⁶⁴ But in some jurisdictions the proportionate amount of his estate which a testator may devote to such purposes has been limited by statute,⁶⁵ while not infre-

⁶¹ 1 Jar. Wills, 75; *Burdett v. Hapgood*, 1 P. Wms. 486. See, also, *De Levillain v. Evans*, 39 Cal. 120; *Gardner v. Merritt*, 32 Md. 78, 3 Am. Rep. 115.

⁶² Litt. § 168; 1 Jar. Wills, 75.

⁶³ *In re Glass' Estate*, 164 Cal. 765, 130 Pac. 868.

⁶⁴ *Pomeroy's Eq. Juris.* (3d Ed.) § 1025.

⁶⁵ California: Civ. Code, § 1313 (amount given to charity shall not exceed one-third of the distributable estate). Construed in *Re Royer's Estate*, 123 Cal. 614, 56 Pac. 461, 44 L. R. A. 364.

Georgia: Code 1910, § 3851 (limiting devises to religious or civil institutions of testator leaving wife or child to one-third of his estate). Construed in *Kelley v. Welborn*, 110 Ga. 540, 35 S. E. 636.

New York: Laws 1860, p. 607, c. 360, § 1 (limiting devises to charitable associations or corporations of a testator leaving husband, wife, child, or parent to one-half his estate). Statute does not apply to a permanent charitable devise to trustees (*Allen v. Stevens*, 161 N. Y. 122, 55 N. E. 568, reversing 33 App. Div. 485, 54 N. Y. Supp. 8), nor to gifts to a municipal corporation (*In re Crane's Will*, 159 N. Y. 557, 54 N. E. 1089). The statute applies to a gift absolutely, but in fact upon a secret trust for the benefit of charitable corporations. *Trustees of Amherst College v. Ritch*, 151 N. Y. 282, 45 N. E. 876, 37 L. R. A. 305. The statute was passed for the sole benefit of those

quently gifts of this character are rendered invalid unless the will is executed at least a certain specified time before the testator's death.⁶⁶

Aliens

At common law an alien could take land by devise, and hold the title subject to the right of the sovereign to procure an escheat or forfeiture by information and office found.⁶⁷ Personal property might be acquired by an alien as completely as by a citizen,⁶⁸ subject, of course, to confiscation in event of his becoming an alien enemy.

While in many states an alien, by statute or by constitutional provision, stands precisely upon the footing of a citizen, in his capacity to take land by devise,⁶⁹ in others nonresident aliens are, in

mentioned therein, and, if they voluntarily release their interests under the will, no one else can impeach its validity. *Trustees of Amherst College v. Ritch*, 151 N. Y. 282, 45 N. E. 876, 37 L. R. A. 305. See, also, *Allen v. Stevens*, 22 Misc. Rep. 158, 49 N. Y. Supp. 431. Under this act, a testator cannot give more to two or more charitable institutions than he could to one. In *re Torrance's Estate* (Sur.) 15 Misc. Rep. 317, 37 N. Y. Supp. 583. And it applies to foreign institutions of the kind referred to in the act, although, by the law of the state of their creation, their power to receive bequests is unrestricted. *Scott v. Ives*, 22 Misc. Rep. 749, 51 N. Y. Supp. 49.

A bequest to a priest of a certain church, for masses, is not a bequest to a religious association, as the term is used in this statute. In *re Zimmerman's Will*, 22 Misc. Rep. 411, 50 N. Y. Supp. 395.

⁶⁶ California: Civ. Code, § 1313 (thirty days).

Georgia: Code 1910, § 3851 (ninety days).

New York: Laws 1848, p. 448, c. 319, § 6 (two months). But this section, in terms, applies only to corporations organized thereunder. In *re Fitzsimmons' Estate*, 29 Misc. Rep. 731, 62 N. Y. Supp. 1009; *Pritchard v. Kirsch*, 58 App. Div. 332, 68 N. Y. Supp. 1049; *Spencer v. Association*, 36 Misc. Rep. 393, 73 N. Y. Supp. 712; In *re Cornelius' Will*, 23 Misc. Rep. 434, 51 N. Y. Supp. 877; In *re Hardy*, 28 Misc. Rep. 307, 59 N. Y. Supp. 912; In *re Brush's Will*, 35 Misc. Rep. 689, 72 N. Y. Supp. 421. See, also, *Fairchild v. Edson*, 154 N. Y. 199, 48 N. E. 541, 61 Am. St. Rep. 609.

Ohio: Gen. Code 1912, § 10504 (one year, if testator leave "issue of his body" or an adopted child). Construed in *Theobald v. Fugman*, 64 Ohio St. 473, 60 N. E. 606; *Davis v. Davis*, 62 Ohio St. 411, 57 N. E. 317, 78 Am. St. Rep. 725; *Huldekoper v. Perry*, 14 Ohio Cir. Ct. R. 68.

Pennsylvania: Act of 1855 (P. L. 332), thirty days, if bequest is made to a religious or charitable use.

⁶⁷ *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch, 603, 3 L. Ed. 453; *Scanlan v. Wright*, 13 Pick. (Mass.) 523, 25 Am. Dec. 344; *Sheaffe v. O'Neill*, 1 Mass. 256; *Racoullat v. Sansevain*, 32 Cal. 376; *Lenahan v. Spaulding*, 57 Vt. 115.

⁶⁸ *Craig v. Leslie*, 3 Wheat. 563, 4 L. Ed. 460.

⁶⁹ Alabama: Code 1907, § 2831.

Georgia: Code 1910, § 2173.

Iowa: Const. art. 1, § 22 (applying only to resident aliens).

Kentucky: St. 1915, § 334 (after declaring intention to become a citizen of United States).

terms, prohibited from holding lands by devise or in any manner,⁷⁰ in others aliens of any description are forbidden to take land by devise,⁷¹ while, again, aliens are allowed to take, provided that they sell the land within a prescribed number of years.⁷²

Statutes disabling aliens to take real estate are sometimes construed as making a devise to an alien absolutely void;⁷³ but usually such statutes are construed as giving to the state alone the right to raise the question of incapacity of the alien to hold title to real estate.⁷⁴

Corporations

By the various statutes of mortmain, corporations had been incapacitated from holding title to land without license from the crown, and the statute of wills⁷⁵ expressly excepted out of its enabling clause devises to bodies politic and corporate. Accordingly a devise to a corporation, whether aggregate or sole, either for its own benefit or as trustee, was void; and the lands so devised descended to the heir, either beneficially or charged with the trust, as the case might be.⁷⁶ The statute 1 Vict. c. 26, contained no such prohibition, in consequence of which corporations in England had capacity to take land by devise, though a proper license was needed to enable them to hold land thus acquired because of the disability arising by reason of the mortmain statutes.⁷⁷ As the statutes of mortmain have rarely been held to be a part of the common law in the United States, and as the various statutes of wills do not incapacitate corporations as beneficiaries, they may acquire land by devise, in the absence of some provision in their charters or the general law to the contrary.⁷⁸ In the absence of restraining laws,

⁷⁰ See Code Iowa 1897, § 2889. Construed in *Furenes v. Mickelson*, 86 Iowa, 508, 53 N. W. 416.

⁷¹ Washington: Const. art. 2, § 33 (inapplicable where alien has declared his intention to become a citizen of the United States).

⁷² In Illinois, a resident alien may hold land six years. *Jones & A. Ill. Stat.* 1913, c. 6, par. 284.

⁷³ *De Graff v. Went*, 164 Ill. 485, 45 N. E. 1075.

⁷⁴ *Manuel v. Wulff*, 152 U. S. 505, 14 Sup. Ct. 651, 38 L. Ed. 532; *Abrams v. State*, 45 Wash. 327, 88 Pac. 327, 9 L. R. A. (N. S.) 186, 122 Am. St. Rep. 914, 13 Ann. Cas. 527.

⁷⁵ 34 Hen. VIII, c. 5.

⁷⁶ 1 Jar. Wills, 63.

⁷⁷ *Id.*

⁷⁸ *White v. Howard*, 38 Conn. 342; *American Bible Soc. v. Marshall*, 15 Ohio St. 537; *White v. Keller*, 68 Fed. 796, 15 C. C. A. 683.

Such provisions are sometimes found. In New York, no devise to a corporation is valid unless the corporation be expressly authorized to take by devise. *Wright v. Methodist Episcopal Church*, 1 Hoff. Ch. 225; *Andrew v. Society*, 6 N. Y. Super. Ct. 156. Sometimes the amount of real estate which

corporations have apparently always had the right of taking personal property by will.⁷⁹

The foregoing principles apply substantially to municipal as well as to private corporations. In the absence of legislation to the contrary, such a devise is valid if it be for purposes such as can be accomplished by the municipality in view of its statutory powers.⁸⁰ And, in the absence of statutory prohibition, a devise or bequest to any public corporation should be valid.⁸¹

Subscribing Witnesses

All witnesses to a will must be competent or credible. A witness who was a beneficiary under a will was incompetent by reason of his interest under the instrument. Hence, if one of the necessary witnesses was thus interested, the will was void. To remedy this, it has generally, though not universally, been provided by statute that a bequest to a subscribing witness shall be void, and that the will shall otherwise be valid.⁸²

Beneficiaries Incompetent by Considerations of Public Policy

While an illegitimate child in esse, whether born or unborn, is competent to take under a will, the only serious question being as

a corporation can hold is limited to a certain sum. A devise in excess of this amount is held void in some jurisdictions (*In re McGraw's Estate*, 111 N. Y. 66, 19 N. E. 233, 2 L. R. A. 387), while in others the limitation is held to operate only in favor of the state (*Farrington v. Putnam*, 90 Me. 405, 37 Atl. 652, 38 L. R. A. 339; *In re Stickney's Will*, 85 Md. 79, 36 Atl. 654, 35 L. R. A. 693, 60 Am. St. Rep. 308; *Jones v. Habersham*, 107 U. S. 174, 183, 2 Sup. Ct. 336, 27 L. Ed. 401; *De Camp v. Dobbins*, 29 N. J. Eq. 36). Were the question res integra, the former view would appear sound on principle, and in view of the obvious purpose of the legislation in question, but by the weight of authority, particularly in view of the decisions upon analogous questions involving the validity of a corporation's title to real estate, the latter view is upheld as correct.

A foreign corporation may take by devise. *Santa Clara Female Academy v. Sullivan*, 116 Ill. 375, 6 N. E. 183, 56 Am. Rep. 776.

⁷⁹ *Burbank v. Whitney*, 24 Pick. (Mass.) 151, 35 Am. Dec. 312; *Trustees of Phillips Academy v. King*, 12 Mass. 546; *McCartee v. Society*, 9 Cow. (N. Y.) 437, 18 Am. Dec. 516; *Gibson v. McCall*, 1 Rich. Law (S. C.) 174; *Thompson v. Swoope*, 24 Pa. 474.

⁸⁰ 1 Underhill, Wills, § 74. See, also, *Quincy v. Attorney General*, 160 Mass. 431, 35 N. E. 1066; *Carder v. Board*, 16 Ohio St. 353; *McIntosh v. City of Charleston*, 45 S. C. 584, 23 S. E. 943; *Sheldon v. Town of Stockbridge*, 67 Vt. 299, 31 Atl. 414.

A bequest to a municipality of the German Empire is good. *In re Huss*, 126 N. Y. 537, 27 N. E. 784, 12 L. R. A. 620.

⁸¹ *Estate of Bulmer*, 59 Cal. 131 (devise to a school district); *Fulbright v. Perry County*, 145 Mo. 432, 46 S. W. 955 (devise to a county); *Dickson v. United States*, 125 Mass. 311, 28 Am. Rep. 230 (devise to United States).

⁸² For full discussion of the competency of subscribing witnesses, see post, p. 200.

to its sufficient designation,⁸² yet the early cases were opposed to gifts to such children neither born nor conceived.⁸⁴ But dicta to the contrary have been thrown out.⁸⁵ So far as the objection to gifts of this description because of uncertainty goes, it is plainly of little weight, for a gift to the future illegitimate children of a woman is obviously as certain as is the undoubtedly valid gift to her legitimate children; but the objections on the ground of public policy are very serious, and are powerfully set forth by Mr. Jarman,⁸⁶ who, after reviewing the authorities, concludes such gifts to be invalid.⁸⁷ But if testator's intention to provide for a future-born illegitimate child clearly appears and the will describes the intended beneficiary with sufficient certainty, by the weight of modern authority a devise or bequest to such a child is valid.⁸⁸

On the same principle of public policy, conditions of a testamentary gift tending to separation or divorce between husband and wife are held void,⁸⁹ and a beneficiary who murders the testator for the purpose of hastening his enjoyment of the gift should not be permitted to profit by his iniquity.⁹⁰ The Louisiana Code provides that a will made in favor of the testator's concubine shall be null and void,⁹¹ but in the absence of such a statute a testator may make

⁸² 1 Jar. Wills, 74. See *Smith v. Du Bose*, 78 Ga. 413, 3 S. E. 309, 6 Am. St. Rep. 260, and *In re Sander's Estate*, 126 Wis. 660, 105 N. W. 1064, 5 Ann. Cas. 508. The amount which can be given to such child is sometimes limited by statute. Civ. Code S. C. 1902, § 2487 (one-fourth where there is a lawful wife or children).

⁸⁴ *Blodwell v. Edwards*, Cro. El. 510. "The law will not favor such a generation, nor expect that such shall be."

⁸⁵ *Wilkinson v. Adam*, 1 V. & B. 446.

⁸⁶ 2 Jar. Wills, 1108.

⁸⁷ *Id.* p. 1114.

⁸⁸ *Sullivan v. Parker*, 113 N. C. 301, 18 S. E. 347; *In re Hastie's Trusts*, L. R. 35 Ch. Div. 728. See, also, *Hayden v. Barrett*, 172 Mass. 472, 52 N. E. 530, 70 Am. St. Rep. 295; *Heater v. Van Auken*, 14 N. J. Eq. 159; *Scholl's Will*, 100 Wis. 650, 76 N. W. 616.

A gift to a future illegitimate child described only by reference to paternity has been held invalid. *In re Bolton*, L. R. 31 Ch. Div. 542.

⁸⁹ *Conrad v. Long*, 33 Mich. 78.

⁹⁰ *RIGGS v. PALMER*, 115 N. Y. 506, 22 N. E. 188, 5 L. R. A. 340, 12 Am. St. Rep. 819, *Dunmore Cas. Wills*, 77—a decision somewhat criticised, but reaching a desirable result. See, however, *Owens v. Owens*, 100 N. C. 240, 6 S. E. 794, and *Shellenberger v. Ransom*, 41 Neb. 631, 59 N. W. 935, 25 L. R. A. 564.

The murder of the testator by a devisee does not render the devise void, but should authorize proceedings in equity to deprive the devisee of the fruits of his crime. *Ellerson v. Westcott*, 148 N. Y. 149, 42 N. E. 540.

⁹¹ See *Gibson v. Dooley*, 32 La. Ann. 959.

In Louisiana, the Code also prohibits ministers of religion who have professionally attended a sick person during his last illness from receiving any

a valid bequest or devise to a paramour.⁹² The question as to what contravenes public policy in this connection is a question of law to be determined by the court.⁹³

WHAT MAY BE DISPOSED OF BY WILL

55. The power of testamentary disposition extends to all interests in real and personal estate which at the decease of the testator would, if not so disposed of, devolve to his heir at law or personal representative, whether the testator be the legal or the beneficial owner only, or unite in himself both these characters.

The above rule, as stated by Mr. Jarman,⁹⁴ is abundantly supported by the authorities. An executory interest in real or personal estate is disposable by will, if the nature of the contingency upon which it is dependent be such that the interest does not cease with the life of the testator.⁹⁵ So with vested estates, even though liable to be defeated by conditions subsequent.⁹⁶ A naked legal title may be devised⁹⁷ and one in possession of land without other title may devise his interest.⁹⁸ Rights of action⁹⁹ and of entry¹ were not originally devisable, but this has been generally changed by statute.² Any equitable interest in land, including those arising

donation made during that illness. See *Succession of Villa*, 132 La. 714, 61 South. 765.

⁹² *Arnault v. Arnault*, 52 N. J. Eq. 801, 31 Atl. 606; *Monroe v. Barclay*, 17 Ohio St. 302, 93 Am. Dec. 620.

⁹³ *Smith v. Du Bose*, 78 Ga. 413, 3 S. E. 309, 6 Am. St. Rep. 260.

⁹⁴ 1 Jar. Wills, 48.

⁹⁵ *Goodtitle v. Wood*, 3 T. R. 94; *Doe dem. Perry v. Jones*, 1 H. Bl. 30; *Moor v. Hawkins*, 2 Eden, 342; *Inglby v. Amcotts*, 21 Beav. 585. See *Allen v. Watts*, 98 Ala. 384, 11 South. 646; *Fisher v. Wagner*, 109 Md. 243, 71 Atl. 999, 21 L. R. A. (N. S.) 121; *Rembert v. Evans*, 86 S. C. 445, 68 S. E. 659.

The contingency must be one of event and not of person. *Mohn v. Mohn*, 148 Iowa, 288, 126 N. W. 1127; *McClain v. Capper*, 98 Iowa, 145, 67 N. W. 102. A crop yet to be grown may be bequeathed. *Rock v. Zimmermann* (1910) 25 S. D. 237, 126 N. W. 265.

⁹⁶ *Pinbury v. Elkin*, 1 P. Wms. 563, 566; *Winslow v. Goodwin*, 7 Metc. (Mass.) 363; *Doe dem. Ingram v. Roe*, 1 Houst. (Del.) 276.

⁹⁷ *Atwood v. Weems*, 99 U. S. 183, 25 L. Ed. 471; *Whittemore v. Bean*, 6 N. H. 47.

⁹⁸ *Asher v. Whitlock*, L. R. 1 Q. B. 1.

⁹⁹ *Baker v. Hacking*, Cro. Car. 387, 405; *Doe dem. Cooper v. Finch*, 4 B. & Ad. 283.

¹ *Goodright v. Forrester*, 8 East, 564.

² For English statute, see 1 Jar. Wills, 50. Code N. C. 1883, § 2140, is a type of many American statutes on this point. Construed in Methodist Protestant Church of *Henderson v. Young*, 130 N. C. 8, 40 S. E. 691.

from an agreement for its purchase, may be disposed of by will.³ So the proceeds of a policy of life insurance payable to the personal representatives of the insured may be bequeathed,⁴ and one may be a legatee who has no insurable interest in the life of the testator;⁵ otherwise with policies payable to a particular beneficiary, whom the insured has no power to change, or whom he can change only in a particular manner, which he has not employed.⁶

What may not be Devised

A possibility, when the person to take is not ascertainable, cannot be devised;⁷ neither can a naked expectancy, such as that of the heir that he may inherit from his ancestor, or that of a beneficiary under a will whose maker is still alive;⁸ otherwise with expectancies coupled with an interest.⁹ A testator disseised of lands could not, at common law, transfer a good title thereto by will,¹⁰ but modern will statutes are usually construed as permitting a devise by one who has been disseised.¹¹ Neither husband nor wife can, as a rule, defeat by will the interest secured by statute to the other in the decedent's real or personal estate, unless provision is made in lieu thereof in the will itself, when the survivor is commonly put to his election as between the statutory provision and that of the will.¹² So a right to enter for breach of condition subsequent is not ordinarily devisable, in the absence of an express statutory provision to the contrary.¹³ And a testator has no prop-

³ *Broome v. Monck*, 10 Ves. p. 605; *Marston v. Fox*, 8 Ad. & E. 14; *Dodge v. Gallatin*, 130 N. Y. 117, 29 N. E. 107; *Malin v. Malin*, 1 Wend. (N. Y.) 625; *Raymond v. Butts*, 84 Ohio St. 51, 95 N. E. 387.

⁴ *Maclean v. Fisher* (1910) 60 Fla. 331, 53 South. 614; *Fletcher v. Williams* (Tex. Civ. App.) 66 S. W. 860; *Golder v. Chandler*, 87 Me. 63, 32 Atl. 784; *Hartwig v. Schiefer*, 147 Ind. 64, 46 N. E. 75.

⁵ *Fletcher v. Williams* (Tex. Civ. App.) 66 S. W. 860.

⁶ *Daniels v. Pratt*, 143 Mass. 216, 10 N. E. 166; *Mellows v. Mellows*, 61 N. H. 137; *In re Tinney's Estate*, 49 Misc. Rep. 213, 99 N. Y. Supp. 159.

⁷ 4 Kent, Comm. 262; *Loring v. Arnold*, 15 R. I. 428, 8 Atl. 335.

⁸ *Perry v. Hunter*, 2 R. I. 80.

⁹ *Moor v. Hawkins*, 2 Eden, 341; *Succession of Allen*, 49 La. Ann. 1096, 22 South. 319.

¹⁰ *Goodright v. Forrester*, 8 East, 552; *Poor v. Robinson*, 10 Mass. 131.

¹¹ *May v. Slaughter*, 10 Ky. (3 A. K. Marsh.) 505; *Jackson v. Varlick*, 7 Cow. (N. Y.) 238; *Hyer v. Shobe*, 2 Munf. (Va.) 200.

The Wills Act, 1 Vict. c. 26, § 3 (1837), expressly authorizes the devise of rights of entry.

¹² See *Hayes v. Seavey*, 69 N. H. 308, 46 Atl. 189; *Otts v. Otts*, 80 S. O. 16, 61 S. E. 109; *In re Little*, 22 Utah, 204, 61 Pac. 899.

¹³ *Uplington v. Corrigan*, 151 N. Y. 143, 45 N. E. 359, 37 L. R. A. 794. See, also, *Southard v. N. J. Cent. R. Co.*, 26 N. J. Law, 13.

erty in his body, such as to enable him to dispose thereof by will.¹⁴ While there was never any question as to the power of a testator to dispose of personalty acquired subsequent to the execution of the will if such was his manifest intention,¹⁵ the rule was otherwise with regard to realty. There seisin was regarded as necessary from the time of the execution of the will until it became operative by the death of the testator. If, therefore, a testator devised all the real estate of which he should be seised at his death, and after the making of his will purchased lands in fee simple, such lands did not pass by the will, but descended to his heir at law.¹⁶ This doctrine has, however, been very generally changed by statute.

A disposal by will by one of several joint tenants of his interest in the property thus held is void in case the testator dies in the lifetime of his co-proprietors, whose claim by survivorship takes precedence over the claim of the beneficiary,¹⁷ and a husband has no power to devise land held by himself and wife as tenants by the entirety.¹⁸

Damages recovered by a personal representative for wrongfully causing his decedent's death cannot pass by the will of decedent,¹⁹ and one who has made a fraudulent conveyance of realty can make no devise of such realty even in a jurisdiction where the statute authorizes the administrator or executor to have set aside a fraudulent conveyance by his decedent.²⁰

¹⁴ *Enos v. Snyder*, 131 Cal. 68, 63 Pac. 170, 53 L. R. A. 221, 82 Am. St. Rep. 330.

¹⁵ *James v. Dean*, 11 Ves. 389; *Walt v. Belding*, 24 Pick. (Mass.) 136; *Loveren v. Lamprey*, 22 N. H. 434; *McNaughton v. McNaughton*, 34 N. Y. 201; *Nichols v. Allen*, 87 Tenn. 131, 9 S. W. 430.

¹⁶ 1 Jar. Wills, 50, and cases cited; *Carroll v. Carroll*, 16 How. 275, 14 L. Ed. 936; *George v. Green*, 13 N. H. 521; *McKinnon v. Thompson*, 3 Johns. Ch. (N. Y.) 307, 310; *Lelper's Ex'rs v. Irvine*, 26 Pa. 54; *Hays v. Jackson*, 6 Mass. 149; *Walt v. Belding*, 24 Pick. (Mass.) 129; *Brigham v. Winchester*, 1 Metc. (Mass.) 390.

¹⁷ 1 Jar. Wills, 48; Co. Litt. 185a.

¹⁸ *Chaplin v. Leapley*, 35 Ind. App. 511, 74 N. E. 546.

¹⁹ *Sturges v. Sturges*, 126 Ky. 80, 102 S. W. 884, 31 Ky. Law Rep. 537, 12 L. R. A. (N. S.) 1014.

²⁰ *Moore v. Waldstein*, 74 Ark. 273, 85 S. W. 416.

CHAPTER VII

MISTAKE, FRAUD, AND UNDUE INFLUENCE

- 56-57. Mistakes may be Either External or Internal.
- 58. Fraud Defined—Effect of.
- 59-60. Undue Influence Defined—Effect of.
- 61. Burden of Proof.
- 62. Confidential Relations as Affecting Undue Influence.
- 63. Evidence of Undue Influence.

MISTAKES MAY BE EITHER EXTERNAL OR INTERNAL

- 56. An external mistake may relate either to the identity of the document executed as a will, or to some collateral fact, in consequence of which the provisions of the will are other than would have been the case had the mistake not been made. A will executed in consequence of a mistake of the former kind is inoperative. A mistake of the latter sort does not, as a rule, affect the validity of the will.
- 57. An internal mistake relates to the contents of the instrument. If a will is executed in actual ignorance of certain of its provisions, and upon the supposition that it does not contain them, the will is inoperative with regard to such provisions. If the contents of the instrument are actually known, the will is not affected by the testator's failure to realize the effect of its provisions. Independent of knowledge of its contents, no matter can be incorporated into a will which has failed of incorporation in consequence of mistake.

An instrument executed as a will under a mistake as to its identity cannot be probated by reason of lack of animus testandi. Thus where two wills were prepared, one for each of two sisters, and each, by mistake, executed the instrument prepared for the other, neither was entitled to probate.¹ A will executed in consequence of some collateral mistake, such as the supposed death of a relative,

¹ Goods of Hunt, 3 P. & D. 250.

Accord: Nelson v. McDonald, 61 Hun, 406, 16 N. Y. Supp. 273, and In re Meyer, [1908] P. 353, 3 B. R. C. 339.

So where a party signed what he supposed to be a direction regarding his burial, but which proved to be a will, it was held inoperative as a will. Eldredth v. Marshall, 51 N. J. Eq. 241, 27 Atl. 465.

stands on a different footing. Here the testamentary intention exists, although the form in which it manifests itself may be materially affected by the mistake. But this fact will not affect the validity of the will.² Statutory changes in the law on this point have occasionally been made.³

A will containing provisions of which the testator was actually ignorant is inoperative to the extent of such provisions, by reason of lack of testamentary intent.⁴ Thus a codicil containing a clause revoking all former wills, which the testatrix did not intend to have inserted therein and of whose existence she was unaware at the time of execution, was held to be ineffectual to revoke a prior will.⁵ So where a testator executed a will, leaving all his property to his wife, upon a blank containing a printed bequest to children which was not stricken out, nor read to the testator, and he signed the document supposing it to contain nothing save the bequest to his wife, which had been read to him, the instrument was probated, omitting the residuary clause to the children.⁶

But where the contents of the will are actually communicated to the testator, the will takes effect as written, and no evidence can be received to add to or subtract therefrom. Thus where a will was read over to a testatrix, who intended that a legacy should be given to a certain person whose name had been inadvertently omitted, and whose omission she failed to observe, the will is valid as against the party thus omitted.⁷ So where words were inad-

² *Maynard v. Tyler*, 168 Mass. 107, 46 N. E. 413; *In re White*, 121 N. Y. 406, 24 N. E. 935 (mistake regarding feelings of heirs towards testator); *In re Tousey's Will*, 34 Misc. Rep. 363, 69 N. Y. Supp. 846 (mistake as to non-existence of heirs); *Jones v. Grogan*, 98 Ga. 552, 25 S. E. 590 (mistake as to extent of heir's property); *Kidney's Will*, 33 N. B. 9 (mistake as to legitimacy of child); *Howell v. Troutman*, 53 N. C. 304 (mistake as to testator's fatherhood of beneficiary); *Martin v. Thayer*, 37 W. Va. 38, 16 S. E. 489 (mistake as to conduct of excluded heir); *In re Bedlow*, 67 Hun, 408, 22 N. Y. Supp. 290, accord.

³ See Code Ga. 1873, § 2403, construed in *Mallery v. Young*, 98 Ga. 728, 25 S. E. 918; *Jones v. Grogan*, 98 Ga. 552, 25 S. E. 590.

In Ohio, a child absent and erroneously reported to be dead, if not provided for in will, takes the same share he would have received had testator died intestate. Gen. Code 1912, § 10563.

⁴ *Bradford v. Blossom*, 207 Mo. 177, 105 S. W. 289; *GOODS OF BOEHM*, (1891) P. 247, *Dunmore Cas. Wills*, 82. See article "Striking Words Out of a Will," 26 H. L. R. 212-236.

⁵ *Goods of Oswald*, L. R. 3 P. & D. 162.

In this case the codicil was not read over to the testator. Had such been the case, the decision would have been different.

⁶ *Goods of Duane*, 2 Sw. & Tr. 590.

This case goes purely on the ground of mistake. No fraud was attempted by the party preparing the will.

⁷ *Mitchell v. Gard*, 3 Sw. & Tr. 75. No fraud was pleaded or proved.

vertently inserted in a codicil making certain legacies, which by the will were charges upon land, payable from the personal estate, and the instrument' was read to the testatrix, who executed it without remark, the codicil was given effect as written, though the evidence was clear that it did not effectuate the real intention of the testatrix.⁸ And, regardless of knowledge of the contents of the instrument, nothing can be added thereto by reason of an omission due to a mistake.⁹ This is not by virtue of any so-called rule of evidence, but merely because all modern statutes require that wills shall be in writing, and to piece out a will by showing what the testator would have written if he had made no mistake would do obvious violence to such statutes. Thus the failure of the draughtsman to insert a full description of the property intended for a beneficiary cannot be overcome by a bill in equity for the rectification of the will.¹⁰ So when a testator devised "all his real estate situate in the county of Limerick and the city of Limerick" to a certain beneficiary, parol evidence cannot be received to show that the testator intended to devise all his real estate in the counties of Clare and Limerick, and that by a mistake of the scrivener this intention was thwarted.¹¹

Where the mistake in fact was one of omission, the court will not reject a word intentionally inserted, although an omission would effect the exact result desired by testator. Thus the word "real," inserted in the residuary clause before the word "estate," cannot be subtracted, although it is established by oral evidence that testator intended both realty and personalty to pass by residu-

⁸ *Guardhouse v. Blackburn*, L. R. 1 P. & D. 109. See, also, *Harter v. Harter*, L. R. 3 P. & D. 11.

The arbitrary rule that the fact that the will has been read over to a competent testator, in connection with the proof of its due execution, is conclusive evidence of testator's knowledge and approval of the contents of his will, seems a wise one. See *Wigmore on Ev.* § 2421. There is little American authority in point, but the attitude of the courts is against the permitting of any change in a will duly executed by a competent testator. *McAllister v. Butterfield*, 31 Ind. 25.

⁹ *Gilmore v. Jenkins*, 129 Iowa, 686, 106 N. W. 193, 6 Ann. Cas. 1008.

¹⁰ *Newburgh v. Newburgh*, 5 Mad. 365.

Prior to the statute of wills (1 Vict. c. 26) the ecclesiastical courts had rather loosely received oral testimony as to the testator's intent, and had effectuated that intent as thus established. See *Blackwood v. Damer*, 3 Phillim. 458 (note); *Castell v. Fogg*, 1 Curt. 298; *Fawcett v. Jones*, 3 Phillim. 434, 485-487.

The soundness of these cases may well be doubted. At all events, they are without significance, in view of modern statutes relating to wills.

¹¹ *Miller v. Travers*, 8 Bing. 244.

ary clause.¹² And the courts have usually refused to reject words included in a will by mistake when a rejection would change the effect of those words which remain.¹³

FRAUD DEFINED—EFFECT OF

58. Fraud may be of such a character that the testator is misled or deceived as to the nature or contents of the document which he executes, or it may relate to some extrinsic fact, in consequence of the deception regarding which the testator is led to make a certain will which, but for the fraud, he would not have made. Fraud of the first sort renders the instrument, or that portion of it with reference to which the fraud was practiced, invalid. Under certain circumstances fraud of the second sort may also invalidate the will.

If, in consequence of deception, a party executes a will under a mistake as to the character of the instrument, or under a mistake as to its contents, though aware of its character, the instrument is invalid for want of testamentary intent.¹⁴ Thus where the question involved was as to the validity of one of two wills, it was held that the party relying upon the earlier will should have been allowed to show that when the second will was executed the testator inquired whether it was the same as the former will and was told that it was,¹⁵ and where the name of the executor was surreptitiously inserted in the will, or was different from what testator was led to suppose, the name might be rejected.¹⁶

With regard to fraud relating to some extrinsic fact, the rule is that wherever a legacy is given to a person under a particular character which he has falsely assumed, and which alone can be sup-

¹² *Harter v. Harter*, L. R. 3 P. & D. 11.

Probably it might be shown, were such the case, that no residuary clause was intended, that it was introduced by mistake, and that the testator had no actual knowledge thereof.

¹³ *Rhodes v. Rhodes*, L. R. 7 A. C. 192, 198. See, also, 26 H. L. R. 230.

¹⁴ Fraud in connection with the execution of a will does not mean the same thing as "undue influence." Testator may be a victim of deceit, and still act voluntarily; but, if he is subjected to undue influence, the will of another is substituted for his own. *Shirley v. Ezell*, 180 Ala. 352, 60 South. 905; *In re Snowball's Estate*, 157 Cal. 301, 107 Pac. 598.

¹⁵ *Doe dem. Small v. Allen*, 8 T. R. 147. See, also, *WAITE v. FRISBIE*, 45 Minn. 361, 47 N. W. 1069, *Dunmore Cas. Wills*, 100; *Hildreth v. Marshall*, 51 N. J. Eq. 241, 27 Atl. 465; *Lyon v. Dada*, 111 Mich. 340, 69 N. W. 654.

¹⁶ *Wombacher v. Barthelme*, 194 Ill. 425, 62 N. E. 800.

posed to be the motive of the bounty, the fraud is such as to defeat the legacy. This principle applies to a legacy given "to my husband, the said Edward Lovell," the testatrix having innocently entered into a void marriage with Lovell, who had at the time a former wife living, from whom he had not been divorced;¹⁷ and to a legacy to "my wife, Adelaide," the said Adelaide having falsely represented herself to the testator to be a widow.¹⁸ But the mere retention of the name of a former husband by a widow who has secretly remarried, especially in the absence of proof of any improper motive therefor, is not sufficient to defeat a legacy given to her under that name.¹⁹ And where a prejudice is created towards a natural object of the testator's bounty by the false representations of another, made for the purpose of creating such prejudice, in consequence of which the person so misrepresented is disinherited, the will may be set aside as procured by fraud.²⁰

A fraudulent representation will not invalidate a will unless made prior to or at the time of its execution,²¹ and unless the deception actually induced or affected the will.²²

It is said that where a will is obtained by fraud it is void, and no subsequent ratification is good without a formal re-execution or

¹⁷ *Kennell v. Abbott*, 4 Ves. 802. See, also, *Meluish v. Milton*, 3 Ch. Div. 27.

It is doubtful whether the mere fact of the assumed relationship in the principal case, standing alone, should be sufficient to establish fraud. The fraud on the testatrix may not have been directed toward the procuring of the legacy and testatrix might have made her reputed husband a beneficiary even had she known all the facts. In *Wenning v. Teeple*, 144 Ind. 189, 41 N. E. 600, the court refused to declare a will void, although executed under similar circumstances. In *Anderson v. Berkley*, 1902, 1 Ch. 936, testator gave a legacy to his son's wife, L. Testator's son lived in the Colonies and had written his father of his marriage to L., who in fact only lived with him as his mistress. The court permitted L. to take.

¹⁸ *Wilkinson v. Joughin*, L. R. 2 Eq. 319, *Dunmore Cas. Wills*, 84.

¹⁹ *Rishton v. Cobb*, 5 Mylne & C. 145.

²⁰ *In re Budlong*, 126 N. Y. 423, 27 N. E. 945. See, also, *Coghill v. Kennedy*, 119 Ala. 641, 24 South. 459; *Franklin v. Belt*, 130 Ga. 37, 60 S. E. 146. It is true that in the first-mentioned case some stress is placed upon undue influence, but the case discloses no trace of such influence, apart from the fraud practiced by one of the beneficiaries, of which there was considerable evidence. Indeed, there is no reason why a will procured by fraud should not be vitiated thereby as much as any other instrument.

Fraud in the inducement, as distinguished from fraud in the execution, is sometimes said to be insufficient to vitiate the will. *Sanger v. McDonald*, 87 Ark. 148, 112 S. W. 365; *Page on Wills*, § 124. But this view does not seem to be correct on principle or to be sustained by the authorities.

²¹ *In re Ricks' Estate*, 160 Cal. 450, 117 Pac. 532.

²² *Taylor v. Kelly*, 31 Ala. 59, 68 Am. Dec. 150; *Stewart v. Jordan*, 50 N. J. Eq. 733, 26 Atl. 706.

republication.²³ If, however, the testator, after acquiring full knowledge of the deceit, does not cancel the will, there is no apparent reason why it should not be sustained. Other instruments procured by fraud are voidable, at the option of the party defrauded. It is submitted that the same principle should apply in the case of wills whether obtained by fraud or undue influence.²⁴

UNDUE INFLUENCE DEFINED—EFFECT OF

59. A will which is the result of undue influence is void to the extent that it is the result of such influence.

60. Undue influence is any means employed upon and with the testator which, under the circumstances by which he was surrounded, he could not well resist, and which controlled his volition, and induced him to do what he otherwise would not have done. It must, in some measure, destroy the free agency of the testator, and interfere with the exercise of that independent discretion which the law requires a testator to possess as essential to a valid testamentary disposition.

In one form and another the substance of the above definition, either elaborated or condensed, has been stated in numerous cases. The essential element is the overcoming of the independent volition of the testator.²⁵ Influence, to be undue, must be such as to

²³ *Haines v. Hayden*, 95 Mich. 332, 54 N. W. 911, 35 Am. St. Rep. 566; *Lamb v. Girtman*, 26 Ga. 625; *Chaddick v. Haley*, 81 Tex. 617, 17 S. W. 233.

²⁴ *Taylor v. Kelly*, 31 Ala. 59, 68 Am. Dec. 150; *Earp v. Edgington*, 107 Tenn. 23, 64 S. W. 40. See, also, *Deck v. Deck*, 106 Wis. 470, 82 N. W. 293, and *Van Ness' Will*, 78 Misc. Rep. 592, 139 N. Y. Supp. 485, 519.

²⁵ *Coghill v. Kennedy*, 119 Ala. 641, 24 South. 459; *Johnson v. Armstrong*, 97 Ala. 731, 12 South. 72; *Knox v. Knox*, 95 Ala. 495, 11 South. 125, 36 Am. St. Rep. 235; *In re Packer's Estate*, 164 Cal. 525, 129 Pac. 778; *Appeal of Turner*, 72 Conn. 305, 44 Atl. 310; *Appeal of Dale*, 57 Conn. 127, 17 Atl. 757; *Pritchard v. Henderson*, 3 Pennewill (Del.) 128, 50 Atl. 217; *Perkins v. Perkins*, 116 Iowa, 253, 90 N. W. 55; *Oberdorfer v. Newberger* (Ky.) 67 S. W. 267; *Dean v. Phillips* (Ky.) 61 S. W. 10; *Bledsoe's Ex'x v. Bledsoe* (Ky.) 1 S. W. 10; *Bacon v. Bacon*, 181 Mass. 18, 62 N. E. 990, 92 Am. St. Rep. 397; *Schmidt v. Schmidt*, 47 Minn. 451, 50 N. W. 598; *Campbell v. Carlisle*, 162 Mo. 634, 63 S. W. 701; *Jones v. Roberts*, 37 Mo. App. 163; *McFadin v. Catron*, 120 Mo. 252, 25 S. W. 506; *Riley v. Sherwood*, 144 Mo. 354, 45 S. W. 1077; *Thompson v. Ish*, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552; *Boggs v. Boggs*, 62 Neb. 274, 87 N. W. 39; *In re Johnson's Will*, 80 N. J. Eq. 525, 85 Atl. 254, 260; *Ledwith v. Claffey*, 18 App. Div. 115, 45 N. Y. Supp. 612; *In re Blair*, 16 Daly, 540, 16 N. Y. Supp. 874; *Rollwagen v. Rollwagen*, 63 N. Y. 504; *In re Holman's Estate*, 42 Or. 345, 70 Pac. 908; *Robinson v. Robinson*,

overpower the will without convincing the judgment.²⁶ It has been said that undue influence must be equivalent to coercion or fraud.²⁷ In nearly all cases, no doubt, in the last analysis, the will is that of the testator. Strictly, it may be presumed that no man does an act of this character involuntarily; the will is his, subjectively. But, where undue influence exists, the will is not, objectively, with reference to its operation upon his death, that which the testator would have it.

The reason for the rule is clear. A will, to be valid, must be that of the testator and not of somebody else. It must be what the testator would objectively have it, not what another would objectively have it.

Physical force is not necessary to establish undue influence,²⁸ neither need it be equivalent to physical coercion or restraint.²⁹

From what has been said, it at once follows that mere persuasion or argument, addressed to the judgment or the affections, or appeals to gratitude for past services, and to pity because of needy circumstances, do not amount to undue influence.³⁰ For influences

203 Pa. 400, 53 Atl. 253; *Englert v. Englert*, 198 Pa. 326, 47 Atl. 940, 82 Am. St. Rep. 808; *In re Hoyt's Estate*, 10 Kulp (Pa.) 166; *Chappell v. Trent*, 90 Va. 849, 19 S. E. 314; *In re Evenson's Will*, 152 Wis. 113, 139 N. W. 766.

²⁸ *Hall v. Hall*, L. R. 1 P. & D. 481; *GINTER v. GINTER*, 79 Kan. 721, 101 Pac. 634, 22 L. R. A. (N. S.) 1024, *Dunmore Cas. Wills*, 86.

²⁷ *Boyse v. Rossborough*, 6 H. L. C. 2; *Wingrove v. Wingrove*, 11 P. D. 81; *Mullen v. Johnson*, 157 Ala. 262, 47 South. 584. In this form, the statement is not misleading, but to identify undue influence with fraud is incorrect, and the coupling of the two terms can answer no useful purpose.

An instruction that if the jury believed that the will was not obtained by the exercise of an influence amounting to coercion, by a motive tantamount to force or fear, such was not an undue influence, has been held correct in *Schieffelin v. Schieffelin*, 127 Ala. 14, 28 South. 687. But an instruction that undue influence is improper influence exerted to induce the testator to dispose of his property otherwise than he would have done is insufficient. *Myers v. Hanger*, 98 Mo. 433, 11 S. W. 974.

²⁸ *Estes v. Bridgforth*, 114 Ala. 221, 21 South. 512. The importunity of a wife with regard to a will, yielded to by a sick testator to the end that he may be quiet, may amount to undue influence. *Hacker v. Newborn, Styles*, 427. Here, of course, the will was made voluntarily. The testator made it because he chose to make it. But he made it for the sake of the respite gained thereby for himself, not because he wished for its objective operation to the advantage of his wife and the exclusion of everybody else.

²⁹ *Anderson v. Anderson*, 43 Utah, 26, 134 Pac. 553.

Undue influence may be exercised by working upon the fears or hopes of a weak-minded person; by artful and cunning contrivances; by constant persuasion and effort, so that the mind of the testator is not left free to act intelligently and understandingly. *Marx v. McGlynn*, 88 N. Y. 357, 370.

³⁰ *Eastis v. Montgomery*, 93 Ala. 293, 9 South. 311; *Jones v. Roberts*, 37 Mo. App. 163; *Hall v. Hall*, L. R. 1 P. & D. 481; *Barlow v. Waters* (Ky.) 28 S. W. 785; *Bevelot v. Lestrade*, 153 Ill. 625, 38 N. E. 1056; *Townsend v.*

of this character, if yielded to, would cause the testator to wish that the will might have the objective operation which it contemplates.⁸¹ So the mere fact that the beneficiaries "teased"⁸² or "coaxed"⁸³ the testator to make provisions in his will in their favor does not constitute undue influence. Indeed, a son has a right to importune his mother to make a will in his behalf, and if the only effect of his importunities was to arouse her affections or to appeal to her sense of duty, they are unobjectionable.⁸⁴ So the fact that a wife urged upon her husband the propriety of leaving his property to her, although he had children by a former wife, does not constitute undue influence.⁸⁵ So the influence gained by kindness and affection is not undue, though it induce the testator to make an unequal and unjust distribution of his property in favor of those who have administered to his wants,⁸⁶ and this rule applies as well to the friends of the testator as to his relatives.⁸⁷ And the promptings of friendship and gratitude do not constitute undue influence.⁸⁸

The mere possession of influence, and the opportunity and motive to exercise it, are not sufficient to establish undue influence; it must appear that the influence was exerted, and that it operated to dominate the testator, and to coerce him to make a disposition of his property which he would not otherwise have made.⁸⁹ But undue

Townsend, 128 Iowa, 621, 105 N. W. 110; Appeal of O'Brien, 100 Me. 156, 60 Atl. 880; Robinson v. Stuart, 73 Tex. 267, 11 S. W. 275; Appeal of Turner, 72 Conn. 305, 44 Atl. 310.

⁸¹ Earl of Sefton v. Hopwood, 1 F. & F. 578; Bush v. Lisle, 89 Ky. 393, 12 S. W. 762.

⁸² McCulloch v. Campbell, 49 Ark. 367, 5 S. W. 590.

⁸³ In re Cameron's Estate, 14 Pa. Co. Ct. R. 247, 3 Pa. Dist. R. 101.

⁸⁴ Robinson v. Robinson, 203 Pa. 400, 53 Atl. 253. Otherwise, if she yields for the sake of peace, or to escape serious distress of mind.

⁸⁵ Herwick v. Langford, 108 Cal. 608, 41 Pac. 701.

⁸⁶ Appeal of Turner, 72 Conn. 305, 44 Atl. 310; Hurd v. Reed, 260 Ill. 154, 102 N. E. 1048; Hoerth v. Zable, 92 Ky. 202, 17 S. W. 360; Towson v. Moore, 11 App. D. C. 377; In re Eatley's Will, 82 N. J. Eq. 591, 89 Atl. 776; Converse v. Mix, 63 Wash. 318, 115 Pac. 305; Kerr v. Lunsford, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668.

⁸⁷ Weber v. Strobel, 236 Mo. 649, 139 S. W. 188; Campbell v. Carlisle, 162 Mo. 634, 63 S. W. 701.

⁸⁸ In re Halbert's Will (Sur.) 15 Misc. Rep. 308, 37 N. Y. Supp. 757.

⁸⁹ In re Black's Estate, 132 Cal. 392, 64 Pac. 695; Crump v. Chenault, 154 Ky. 187, 156 S. W. 1053; Schuchhardt v. Schuchhardt, 62 N. J. Eq. 710, 49 Atl. 485; In re Bolles' Will (Sur.) 37 Misc. Rep. 562, 75 N. Y. Supp. 1062; Mason v. Williams, 53 Hun, 398, 6 N. Y. Supp. 479; In re Dixon's Will, 42 App. Div. 481, 59 N. Y. Supp. 421; In re Gihon's Will, 44 App. Div. 621, 60 N. Y. Supp. 65; In re Bedlow, 67 Hun, 408, 22 N. Y. Supp. 290; In re Keefe's Will, 47 App. Div. 214, 62 N. Y. Supp. 124, reversing same case (Sur.) 27 Misc. Rep. 618, 59 N. Y. Supp. 490; Barry v. Graciette (Tex. Civ. App.) 71 S. W. 309.

influence exercised by a third person not a beneficiary is sufficient to invalidate a will.⁴⁰

Influence must Operate at Time of Execution

Undue influence, to render a will invalid, must be connected with its execution, and be operative at that time.⁴¹ Contemporaneous threats have this effect.⁴² But undue influence exercised in the past may be shown as indicating control over the testator, and if such control can be connected with the execution of the will it may render the instrument void.⁴³

Question One for Jury

The existence of undue influence at the time of the execution of the will is one of fact and for the jury, and, if the evidence is such that a rational mind might draw the conclusion reached by that body, its finding will not be disturbed.⁴⁴ Where the contestant's evidence to establish undue influence is wholly insufficient, a verdict may be directed for the proponents.⁴⁵

May Invalidate Will in Whole or in Part

If the portion of the will which was the result of undue influence can be separated from the parts not thereby affected, the portion so

⁴⁰ *Cheney v. Goldy*, 225 Ill. 394, 80 N. E. 289, 116 Am. St. Rep. 145.

⁴¹ *Crowson v. Crowson* (1903) 172 Mo. 691, 72 S. W. 1065; *Knox v. Knox*, 95 Ala. 495, 11 South. 125, 36 Am. St. Rep. 235; *McCulloch v. Campbell*, 49 Ark. 367, 5 S. W. 590; *In re Black's Estate*, 132 Cal. 392, 64 Pac. 695; *In re Shell's Estate*, 28 Colo. 167, 63 Pac. 413, 53 L. R. A. 387, 89 Am. St. Rep. 181; *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113; *POOLER v. CRISTMAN*, 145 Ill. 405, 34 N. E. 57, *Dunmore Cas. Wills*, 53; *Dunaway v. Smoot* (Ky.) 67 S. W. 62; *Morris v. Morton's Ex'rs* (Ky.) 20 S. W. 287; *Haines v. Hayden*, 95 Mich. 332, 54 N. W. 911, 35 Am. St. Rep. 566; *Ketteimann v. Metzger*, 23 Ohio Cir. Ct. R. 61; *Monroe v. Barclay*, 17 Ohio St. 302, 93 Am. Dec. 620; *Reichenbach v. Ruddach*, 127 Pa. 564, 18 Atl. 432; *Gable v. Rauch*, 50 S. C. 95, 27 S. E. 555; *Campbell v. Barrera* (Tex. Civ. App.) 32 S. W. 724; *Trezevant v. Rains* (Tex. Civ. App.) 25 S. W. 1092; *In re Miller's Estate*, 31 Utah, 415, 88 Pac. 338.

⁴² *Moore's Ex'rs v. Blauvelt*, 15 N. J. Eq. 367.

⁴³ *Boyse v. Rossborough*, 6 H. L. C. 2; *Jenckes v. Court of Probate*, 2 R. I. 255; *Ketchum v. Stearns*, 76 Mo. 396; *Rutherford v. Morris*, 77 Ill. 397; *Chandler v. Ferris*, 1 Har. (Del.) 454.

⁴⁴ *Moore v. McDonald*, 68 Md. 321, 12 Atl. 117. See *Coghill v. Kennedy*, 119 Ala. 641, 24 South. 459; *Higginbotham v. Higginbotham*, 106 Ala. 314, 17 South. 516; *In re Kendrick's Estate*, 130 Cal. 360, 62 Pac. 605; *Lischy v. Schrader*, 104 Ky. 657, 47 S. W. 611; *Johnson's Adm'r v. Johnson* (Ky.) 45 S. W. 456; *Hiss v. Welk*, 78 Md. 439, 28 Atl. 400; *In re Seymour's Estate*, 111 Mich. 203, 69 N. W. 494; *RIVARD v. RIVARD*, 109 Mich. 98, 66 N. W. 681, 63 Am. St. Rep. 566, *Dunmore Cas. Wills*, 58; *Gordon v. Burris*, 141 Mo. 602, 43 S. W. 642; *In re Bishop's Will*, 56 Hun, 648, 10 N. Y. Supp. 217; *In re Jacott's Will*, 53 Hun, 634, 6 N. Y. Supp. 122; *In re Armor's Estate*, 154 Pa. 517, 26 Atl. 619; *Smith's Ex'r v. Smith*, 67 Vt. 443, 32 Atl. 255.

⁴⁵ *In re McLane's Estate*, 21 App. D. C. 554.

occasioned may be rejected as void without affecting the validity of the rest.⁴⁶ But if the undue influence affects the entire will, though exercised by only one of the beneficiaries, it is invalid.⁴⁷

BURDEN OF PROOF

61. The burden of showing that a will was the product of undue influence is upon him who alleges such to be the fact.

On principle, the burden of proving that undue influence did not exist should be on the proponent, since the allegation of undue influence, although apparently in the nature of a plea by way of confession and avoidance, in reality traverses the assertion involved in the very offer of a will for probate, that it is the true will of the testator, and not that of another, which it is incumbent on the proponent to show.⁴⁸

However, in nearly all jurisdictions, it is well settled that the party alleging undue influence must prove it.⁴⁹ It is not enough to show that the circumstances attending the execution of the will

⁴⁶ *Eastis v. Montgomery*, 93 Ala. 293, 9 South. 311; *Harrison's Appeal*, 48 Conn. 202; *Wombacher v. Barthelme*, 194 Ill. 425, 62 N. E. 800; *Old Colony Trust Co. v. Bailey*, 202 Mass. 283, 88 N. E. 898; *Steadman v. Steadman* (Pa.) 14 Atl. 406.

⁴⁷ *Coghill v. Kennedy*, 119 Ala. 641, 24 South. 459. See, also, *Lyon v. Dada*, 127 Mich. 395, 86 N. W. 946.

⁴⁸ 1 Jar. Wills (6th Ed.) 68 (Bigelow's note).

Professor Bigelow suggests that the language of the cases may merely mean that the burden of offering evidence upon the issue of undue influence is upon those who allege it. But the language employed is generally too unequivocal to admit of this interpretation, as this learned writer substantially admits. 1 Jar. Wills (6th Ed.) 68 (Bigelow's note).

⁴⁹ *Crowson v. Crowson* (1903) 172 Mo. 691, 72 S. W. 1065; *In re Motz's Estate*, 136 Cal. 558, 69 Pac. 294; *Swearingen v. Inman*, 198 Ill. 255, 65 N. E. 80; *Pepper v. Martin*, 175 Ind. 580, 92 N. E. 777; *Mallow v. Walker*, 115 Iowa, 238, 88 N. W. 452, 91 Am. St. Rep. 158; *In re Allison's Estate*, 104 Iowa, 130, 73 N. W. 489; *Woodford v. Buckner*, 111 Ky. 241, 63 S. W. 617; *Barlow v. Waters* (Ky.) 28 S. W. 785; *Johnson v. Stivers*, 95 Ky. 128, 23 S. W. 957; *Hoffman v. Hoffman*, 192 Mass. 416, 78 N. E. 492; *Crossan v. Crossan*, 169 Mo. 631, 70 S. W. 136; *Tibbe v. Kamp*, 154 Mo. 545, 54 S. W. 879, 55 S. W. 440; *Morton v. Heldorn*, 135 Mo. 608, 37 S. W. 504; *Maddox v. Maddox*, 114 Mo. 35, 21 S. W. 499, 35 Am. St. Rep. 734; *Seebrook v. Fedawa*, 30 Neb. 424, 46 N. W. 650; *Schuchhardt v. Schuchhardt*, 62 N. J. Eq. 710, 49 Atl. 485; *Stoutenburgh v. Hopkins*, 43 N. J. Eq. 577, 12 Atl. 689; *In re Spratt's Will*, 4 App. Div. 1, 38 N. Y. Supp. 329; *In re Clark* (Sur.) 5 Misc. Rep. 68, 25 N. Y. Supp. 712; *Miles v. Treanor*, 194 Pa. 430, 45 Atl. 368; *In re Burns' Estate*, 21 Tex. Civ. App. 512, 52 S. W. 98; *Brown v. Mitchell*, 75 Tex. 9, 12 S. W. 606; *Wallen v. Wallen*, 107 Va. 131, 57 S. E. 596; *Coffman v. Hedrick*,

are consistent with the hypothesis of its having been obtained by undue influence; it must be shown that they are inconsistent with a contrary hypothesis.⁵⁰

CONFIDENTIAL RELATIONS AS AFFECTING UNDUE INFLUENCE

62. The mere fact that a relation of trust or confidence existed between the testator and the beneficiary gives rise to no presumption, i. e., effects no prima facie proof of the exercise by him of undue influence.

Although there is considerable authority to the contrary,⁵¹ the more modern and the prevailing rule is that stated in the black-letter text.⁵² Indeed, the fact that the beneficiary is one with whom the testator has maintained intimate and affectionate relations during his life has been said rather to indicate the absence of undue

32 W. Va. 119, 9 S. E. 65; *Cutler v. Cutler*, 103 Wis. 258, 79 N. W. 240; *Beyer v. Le Fevre*, 186 U. S. 114, 22 Sup. Ct. 765, 46 L. Ed. 1080.

In a few jurisdictions, the burden of showing that the will was not the result of undue influence is on the proponent. *Sheehan v. Kearney*, 82 Miss. 688, 21 South. 41, 35 L. R. A. 102; *Edgerly v. Edgerly*, 73 N. H. 407, 62 Atl. 716; *In re Holman's Estate*, 42 Or. 345, 70 Pac. 908.

⁵⁰ *Schleffelin v. Schleffelin*, 127 Ala. 14, 28 South. 687; *Boggs v. Boggs*, 62 Neb. 274, 87 N. W. 39; *Schuchhardt v. Schuchhardt*, 62 N. J. Eq. 710, 49 Atl. 485; *Boyse v. Rossborough*, 6 H. L. C. 2.

⁵¹ *In re Lockwood*, 80 Conn. 513, 69 Atl. 8; *Richmond's Appeal*, 59 Conn. 226, 22 Atl. 82, 21 Am. St. Rep. 85; *Dale's Appeal*, 57 Conn. 127, 17 Atl. 757; *In re Bromley's Estate*, 113 Mich. 53, 71 N. W. 523; *Gay v. Gillilan*, 92 Mo. 250, 5 S. W. 7, 1 Am. St. Rep. 712; *Jones v. Roberts*, 37 Mo. App. 163; *Bridwell v. Swank*, 84 Mo. 455; *Campbell v. Carlisle*, 162 Mo. 634, 63 S. W. 701; *Byrnes v. Gibson*, 73 N. J. Eq. 617, 68 Atl. 756; *Barkman v. Richards*, 63 N. J. Eq. 211, 49 Atl. 831; *Gidney v. Chappell*, 26 Okl. 737, 110 Pac. 1099.

But the relation of landlord and tenant does not constitute a confidential relation for this purpose. *Tallman's Will*, 9 Pa. Co. Ct. R. 357. Neither does a business relation by which one person acts as agent for another in making investments in a distant state. *In re Sheldon's Will* (Sur.) 16 N. Y. Supp. 454. See, also, *In re Adam's Estate*, 201 Pa. 502, 51 Atl. 368. Nor does the prior release of a debt due to the testator from the beneficiaries show a confidential relation existing between the parties. *Campbell v. Carlisle*, 162 Mo. 634, 63 S. W. 701.

⁵² *McQueen v. Wilson*, 131 Ala. 606, 31 South. 94; *Chandler v. Jost*, 96 Ala. 596, 11 South. 636; *Bancroft v. Otis*, 91 Ala. 279, 8 South. 286, 24 Am. St. Rep. 904; *In re Packer's Estate*, 164 Cal. 525, 129 Pac. 778; *Ethridge v. Bennett*, 9 Houst. (Del.) 295, 31 Atl. 813; *Rutherford v. Morris*, 77 Ill. 397; *Denning v. Butcher*, 91 Iowa, 425, 59 N. W. 69; *GINTER v. GINTER*, 79 Kan. 721, 101 Pac. 634, 22 L. R. A. (N. S.) 1024, *Dunmore Cas. Wills*, 86; *Hoerth v. Zable*, 92 Ky. 202, 17 S. W. 360; *King v. Holmes*, 84 Me. 219, 24 Atl. 819; *Tyson v. Tyson*, 37 Md. 567; *In re Bernsee's Will*, 71 Hun, 27, 24 N. Y. Supp.

influence.⁵³ But where it appears that the beneficiary, who has stood in a fiduciary relation to the testator, has been instrumental in preparing or obtaining the will in his favor, a prima facie case of undue influence is made out; the proponent must then go on with the evidence, and cause the scales to at least balance;⁵⁴ and this principle applies to all cases in which circumstances exist which excite the suspicion of the court.⁵⁵

These principles find specific illustration in the various relations of confidence and intimacy, which will now be considered in detail.

Husband and Wife

No presumption of undue influence arises from the fact that a wife is a beneficiary under her husband's will,⁵⁶ though the will

504; *In re Rohe's Will* (Sur.) 22 Misc. Rep. 415, 50 N. Y. Supp. 392; *In re Smith*, 95 N. Y. 516; *Lee v. Lee*, 71 N. C. 139; *In re Holman's Estate*, 42 Or. 345, 70 Pac. 908; *Messner v. Elliott*, 184 Pa. 41, 39 Atl. 46; *Watterson v. Watterson*, 1 Head (Tenn.) 1; *PARFITT v. LAWLESS*, L. R. 2 P. & D. 462, *Dunmore Cas. Wills*, 90.

There is a distinction between the case of a gift inter vivos and of a bequest by will, when the recipient of the gift or bequest is in a confidential relation. In the former case the relation raises a presumption of undue influence because the fact that the donor deprives himself of property, which he may need during his lifetime, needs explanation. But a testator must leave his property and it is perfectly natural for him to make a will in favor of those with whom he is in a confidential relation.

⁵³ *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113.

⁵⁴ *Coghill v. Kennedy*, 119 Ala. 641, 24 South. 459; *Higginbotham v. Higginbotham*, 106 Ala. 314, 17 South. 516; *Weston v. Teufel*, 213 Ill. 291, 72 N. E. 908; *Jones v. Simpson*, 171 Mass. 474, 50 N. E. 940; *In re Everett's Will*, 153 N. C. 83, 68 S. E. 924; *In re Douglass' Estate*, 162 Pa. 567, 29 Atl. 715; *In re Barney's Will*, 70 Vt. 352, 40 Atl. 1027; *Barry v. Butlin*, 2 Moore, P. C. 480; *Fulton v. Andrew*, L. R. 7 H. L. 448; *Brown v. Fisher*, 68 Law T. (N. S.) 465.

The cases commonly say that any suspicious circumstances connected with the execution of a will in which a party standing in a fiduciary relation to the testator is a beneficiary shifts the burden of showing absence of undue influence upon the beneficiary. But this is probably to be understood as meaning merely that the burden of going on with the evidence passes to the beneficiary under such circumstances, and that evidence will be necessary to meet the prima facie case made out by the contestants. See *Compher v. Browning*, 219 Ill. 429, 76 N. E. 678, 109 Am. St. Rep. 346, deciding that burden of proof does not actually shift.

⁵⁵ *Tyrrell v. Painton*, 6 Reports, 540; *Id.* (1894) Prob. 151; *Robinson v. Robinson*, 203 Pa. 400, 53 Atl. 253 (where the testatrix was aged, and there was evidence of power possessed by the beneficiary over her); *Whitelaw's Ex'r v. Sims*, 90 Va. 588, 19 S. E. 113 (where the will as executed differed widely from the previously expressed intentions of the testatrix).

When the confidential relation is made to appear, slight suspicious circumstances are sufficient to throw on proponent the duty of going forward with evidence. *In re Cooper's Will*, 75 N. J. Eq. 177, 71 Atl. 676.

⁵⁶ *Bulger v. Ross*, 98 Ala. 267, 12 South. 803; *In re Welch's Will*, 6 Cal. App. 44, 91 Pac. 336; *Herwick v. Langford*, 108 Cal. 608, 41 Pac. 701; *In re*

may have been procured by her solicitation and importunity,⁵⁷ to the exclusion of the children by a former marriage,⁵⁸ and though she be the sole beneficiary.⁵⁹ Such is the case though the husband be of yielding disposition, and disposed to follow the guidance of his wife.⁶⁰ Nor will the fact that children were disinherited by the influence of their stepmother invalidate the will.⁶¹ So a will executed by a testator in favor of his wife, from whom he was at the time living apart, will be sustained, where there is nothing suspicious about the circumstances attending its execution.⁶² There is no evidence of undue influence in the fact that a testator, a few days after executing a will in favor of his wife and sister, made another revoking the prior will, and giving all his property to his wife, with no apparent reason for this change in its disposition.⁶³ So evidence that the children by a former marriage were kept away from the house by their stepmother, and that the testator had expressed regret at his second marriage, is insufficient to go to the jury on the question of undue influence, alleged to have been exercised by the wife in regard to the execution of the will.⁶⁴ Illicit relations between the parties prior to their marriage, which was brought about by the woman for the purpose of procuring a will in her favor, do not establish undue influence.⁶⁵

McLane's Estate, 21 App. D. C. 554; **Pierce v. Pierce**, 38 Mich. 412; **Boggs v. Boggs**, 62 Neb. 274, 87 N. W. 39; **Black v. Foljambe**, 39 N. J. Eq. 234; **Stewart v. Stewart**, 57 N. J. Eq. 664, 68 Atl. 1116; **In re Thorne's Estate** (Sur.) 7 N. Y. Supp. 198.

⁵⁷ **In re Townsend's Estate**, 122 Iowa, 246, 97 N. W. 1108; **In re White's Will**, 52 Hun, 613, 5 N. Y. Supp. 295; **In re Lyddy's Will**, 53 Hun, 629, 5 N. Y. Supp. 636; **In re Richardson's Will**, 51 App. Div. 637, 64 N. Y. Supp. 944; **In re McKenna's Will** (Sur.) 4 N. Y. Supp. 458; **Peery v. Peery**, 94 Tenn. 328, 29 S. W. 1; **Deck v. Deck**, 106 Wis. 470, 82 N. W. 293.

⁵⁸ **Gwin v. Gwin**, 5 Idaho, 271, 48 Pac. 295.

⁵⁹ **Kultz v. Jaeger**, 29 App. D. C. 300; **Orth v. Orth**, 145 Ind. 184, 42 N. E. 277, 44 N. E. 17, 32 L. R. A. 298, 57 Am. St. Rep. 185; **In re Fricke**, 64 Hun, 639, 19 N. Y. Supp. 315; **In re Cruger's Will**, 36 Misc. Rep. 272, 73 N. Y. Supp. 412; **In re Cooper's Will**, 166 N. C. 210, 81 S. E. 161; **Kettemann v. Metzger**, 23 Ohio Cir. Ct. R. 61; **In re Watkins' Will**, 81 Vt. 24, 69 Atl. 144.

⁶⁰ **Herwick v. Langford**, 108 Cal. 608, 41 Pac. 701; **In re Motz's Estate**, 136 Cal. 558, 69 Pac. 294; **In re De Baun**, 2 Con. Sur. 304, 9 N. Y. Supp. 807.

⁶¹ **Herwick v. Langford**, 108 Cal. 608, 41 Pac. 701; **Claussenius v. Claussenius**, 179 Ill. 545, 53 N. E. 1006.

⁶² **James v. Sutton**, 36 Neb. 393, 54 N. W. 670.

⁶³ **In re Nelson's Will**, 39 Minn. 204, 39 N. W. 143. See, however, **Krankel's Ex'r v. Krankel** (Ky.) 50 S. W. 863.

⁶⁴ **In re Shell's Estate**, 28 Colo. 167, 63 Pac. 413, 53 L. R. A. 387, 89 Am. St. Rep. 181. See, also, **SEHR v. LINDEMANN**, 153 Mo. 276, 54 S. W. 537, **Dunmore Cas. Wills**, 49; **Defoe v. Defoe**, 144 Mo. 458, 46 S. W. 433.

⁶⁵ **Maynard v. Tyler**, 168 Mass. 107, 46 N. E. 413; **In re Buckley's Will** (Sur.) 2 N. Y. Supp. 24 (semble).

Similar principles prevail where the husband is beneficiary under the will of his wife.⁶⁶ But undue influence may be, and frequently is, exercised by a wife upon the husband in the matter of the execution of his will, as where a bedridden testator was led to make a certain will in consequence of a threat by his wife that she would leave him if he refused to do so,⁶⁷ in which case testator's expression of gratitude towards the beneficiaries and of satisfaction with the will is insufficient to prove the absence of undue influence. So where an aged and feeble testator made a will disinheriting a faithful son, at the demand of his wife, with whom the son had quarreled, a verdict against the will was regarded as justifiable, in view of all the facts.⁶⁸ Such also is the case where the wife married the testator for the purpose of obtaining his property, he being at the time in his last sickness, and where she and her parents conspired to procure the will, which was executed shortly before his death, when he was weak in body and mind, the testator being prevented from seeing any one alone at about the time the will was made.⁶⁹

Illicit Relations Between Testator and Beneficiary

Despite some authority to the contrary,⁷⁰ it is now generally conceded that illicit sexual relations between the testator or testatrix and the beneficiary do not, of themselves, establish a prima facie case of undue influence.⁷¹ But the fact that such relations exist

⁶⁶ *Bulger v. Ross*, 98 Ala. 267, 12 South. 803; *Weathers v. McFarland*, 97 Ga. 266, 22 S. E. 988; *Thompson v. Bennett*, 194 Ill. 57, 62 N. E. 321; *White v. Roes*, 65 Hun, 626, 20 N. Y. Supp. 520; *In re Brunor's Will*, 19 Misc. Rep. 203, 43 N. Y. Supp. 1141; *Gilman v. Ayer*, 63 N. J. Eq. 806, 52 Atl. 1131; *Stoutenburgh v. Hopkins*, 43 N. J. Eq. 577, 12 Atl. 689. See, however, *Dudley v. Gates*, 124 Mich. 440, 83 N. W. 97, 86 N. W. 959; *Armstrong v. Armstrong*, 63 Wis. 162, 23 N. W. 407.

⁶⁷ *In re Sickles' Will*, 63 N. J. Eq. 233, 50 Atl. 577.

⁶⁸ *Perret v. Perret*, 184 Pa. 131, 39 Atl. 33. See, also, *In re Nolte's Will*, 10 Misc. Rep. 608, 32 N. Y. Supp. 226; *Baldwin v. Robinson*, 93 Mich. 438, 53 N. W. 531; *In re Stewart's Will (Sur.)* 10 N. Y. Supp. 744.

⁶⁹ *Primmer v. Primmer*, 75 Iowa, 415, 39 N. W. 676. See, also, *Baker v. Baker*, 102 Wis. 226, 78 N. W. 453.

⁷⁰ *Snyder v. Erwin*, 229 Pa. 644, 79 Atl. 124, 140 Am. St. Rep. 737; *Dean v. Negley*, 41 Pa. 312, 80 Am. Dec. 620. See 1 Underhill, Wills, § 149.

The Pennsylvania cases above cited do not lay down a general rule applicable to all cases and they raise a presumption of undue influence only when the will diverts the entire estate from the natural objects of testator's bounty and estate is given to the one with whom testator has had illicit relations.

⁷¹ *Moore v. Helneke*, 119 Ala. 627, 24 South. 374; *Wenning v. Teeple*, 144 Ind. 189, 41 N. E. 600; *Waters v. Reed*, 129 Mich. 131, 88 N. W. 394; *Fulton v. Freeland*, 219 Mo. 494, 118 S. W. 12, 131 Am. St. Rep. 576; *Smith v. Smith*, 48 N. J. Eq. 566, 25 Atl. 11; *In re Willford's Will (N. J. Prerog.)* 51 Atl. 501;

may be considered, along with others, in determining the question.⁷²

Blood Relationship—More Particularly Between Parent and Child

No presumption of undue influence arises from the fact that a child is a beneficiary under a parent's will, though he may receive thereunder a disproportionate share of the estate, and may have lived on terms of intimacy and trust with the testator;⁷³ and the same rule apparently applies to other relatives who are beneficiaries,⁷⁴ such as brothers and sisters,⁷⁵ grandsons,⁷⁶ nephews and

In re Mondorf's Will, 110 N. Y. 450, 18 N. E. 256; In re Rand's Will, 28 Misc. Rep. 465, 59 N. Y. Supp. 1082; In re Westerman's Will, 29 Misc. Rep. 409, 61 N. Y. Supp. 1065; Monroe v. Barclay, 17 Ohio St. 302, 93 Am. Dec. 620; In re Johnson's Estate, 159 Pa. 630, 28 Atl. 448; In re Heilbrun's Estate, 9 Pa. Co. Ct. R. 350; In re Gordon's Estate, 28 Pittsb. Leg. J. (N. S.) 78.

⁷² Alford v. Johnson, 103 Ark. 236, 146 S. W. 516; In re Ruffino's Estate, 116 Cal. 304, 48 Pac. 127; Waters v. Reed, 129 Mich. 131, 88 N. W. 394; Smith v. Henline, 174 Ill. 184, 51 N. E. 227; McClure v. McClure, 86 Tenn. 173, 6 S. W. 44; Stewart v. Lyons, 54 W. Va. 665, 47 S. E. 442.

Evidence of the existence of meretricious relations properly may be excluded when there is no other proof of the exercise of undue influence. Snell v. Weldon, 239 Ill. 279, 87 N. E. 1022.

⁷³ Eastis v. Montgomery, 93 Ala. 293, 9 South. 311; In re Ricks' Estate, 160 Cal. 450, 117 Pac. 532; Appeal of Dale, 57 Conn. 127, 17 Atl. 757; Huffman v. Graves, 245 Ill. 440, 92 N. E. 289; Furlong v. Carragher, 108 Iowa, 492, 79 N. W. 277; Marshall v. Hanby, 115 Iowa, 318, 88 N. W. 801; Blake v. Rourke, 74 Iowa, 519, 38 N. W. 392; King v. Holmes, 84 Me. 219, 24 Atl. 819; Severance v. Severance, 90 Mich. 417, 52 N. W. 292; Little v. Little, 83 Minn. 323, 86 N. W. 408; Aylward v. Briggs, 145 Mo. 604, 47 S. W. 510; West v. West, 144 Mo. 119, 46 S. W. 139; Cash v. Lust, 142 Mo. 630, 44 S. W. 724, 64 Am. St. Rep. 576; Berberet v. Berberet, 131 Mo. 399, 33 S. W. 61, 52 Am. St. Rep. 634; McFadin v. Catron, 120 Mo. 252, 25 S. W. 506; Maddox v. Maddox, 114 Mo. 35, 21 S. W. 499, 35 Am. St. Rep. 734; Latham v. Schaal, 25 Neb. 535, 41 N. W. 354; In re Barber's Will (N. J. Prerog.) 49 Atl. 826; Salter v. Ely, 58 N. J. Eq. 581, 43 Atl. 1098; Fritz v. Turner, 46 N. J. Eq. 515, 22 Atl. 125; White v. Starr, 47 N. J. Eq. 244, 20 Atl. 875; Brick v. Brick, 44 N. J. Eq. 282, 18 Atl. 58; Elkinton v. Brick, 44 N. J. Eq. 154, 15 Atl. 391, 1 L. R. A. 161; Brick v. Brick, 43 N. J. Eq. 167, 10 Atl. 869; Conover v. Conover (N. J. Prerog.) 8 Atl. 500; In re Hurlbut, 26 Misc. Rep. 461, 57 N. Y. Supp. 648; In re Hurlbut's Will, 48 App. Div. 91, 62 N. Y. Supp. 698; In re Woodward's Will, 52 App. Div. 494, 65 N. Y. Supp. 405; In re Evans' Will, 123 N. C. 113, 31 S. E. 267; In re Friend's Estate, 198 Pa. 363, 47 Atl. 1106; In re Logan's Estate, 195 Pa. 282, 45 Atl. 729; In re Coleman's Estate, 185 Pa. 437, 40 Atl. 69; In re Foster's Estate, 142 Pa. 62, 21 Atl. 798; In re Butler's Will, 110 Wis. 70, 85 N. W. 678; In re Morgan's Will, 110 Wis. 7, 85 N. W. 644.

⁷⁴ Succession of Stewart, 51 La. Ann. 1553, 26 South. 460.

⁷⁵ In re McDevitt, 95 Cal. 17, 30 Pac. 101; Fox v. Martin, 104 Wis. 581, 80 N. W. 921; In re Crane's Will, 68 App. Div. 355, 74 N. Y. Supp. 88; In re Green, 67 Hun, 527, 22 N. Y. Supp. 1112.

⁷⁶ In re Rosecrans' Will, 52 Hun, 615, 5 N. Y. Supp. 516.

nieces,⁷⁷ cousins,⁷⁸ and to more distant relatives,⁷⁹ and to members of the testator's family, though not of his kin,⁸⁰ and to a son-in-law,⁸¹ and to a sister-in-law.⁸² The rule also applies to wills made by children in favor of their parents.⁸³ When any one thus related stands in the position of a confidential agent towards the testator, the same principles then control as in the case of wills making agents of this character beneficiaries.⁸⁴ But where, in any of these cases, the facts establish an undue influence on the part of such beneficiary, as control over the testator by fear,⁸⁵ or overpersuasion,⁸⁶ or domination by reason of testator's weakness of mind,⁸⁷ a will thus procured may be avoided.⁸⁸

Guardian and Ward

Gifts by a ward to his guardian or to one who formerly stood in that relation are looked upon with suspicion. On principle, a bequest by a ward to one who recently acted as guardian should raise no presumption of undue influence, if beneficiary is not shown to have had anything to do with the execution of the will;⁸⁹ but in

⁷⁷ *Kischman v. Scott*, 166 Mo. 214, 65 S. W. 1031; *Doherty v. Gilmore* (Mo.) 35 S. W. 1130; *Hampton v. Westcott*, 49 N. J. Eq. 522, 25 Atl. 254; *In re Wells*, 96 Me. 161, 51 Atl. 868; *In re Phyfe's Will* (Sur.) 4 N. Y. Supp. 340; *In re Hedges' Will*, 57 App. Div. 48, 67 N. Y. Supp. 1028; *Epling v. Hutton*, 121 Ill. 555, 13 N. E. 242; *In re Carter's Will*, 60 N. J. Eq. 338, 51 Atl. 65.

⁷⁸ *Roberts v. Clemens*, 202 Pa. 198, 51 Atl. 758.

⁷⁹ *Hegney v. Head*, 126 Mo. 619, 29 S. W. 587.

⁸⁰ *In re Groot*, 72 Hun, 548, 25 N. Y. Supp. 633; *Henry v. Hall*, 106 Ala. 84, 17 South. 187, 54 Am. St. Rep. 22; *Doherty v. Gilmore*, 136 Mo. 414, 37 S. W. 1127.

⁸¹ *In re Journeay's Will*, 162 N. Y. 611, 646, 57 N. E. 1113; *Riley v. Sherwood*, 144 Mo. 354, 45 S. W. 1077.

⁸² *Appeal of McCauley*, 130 Pa. 480, 18 Atl. 617.

⁸³ *In re Andrews' Will*, 33 N. J. Eq. 514; *Coleman's Estate*, 185 Pa. 437, 40 Atl. 69.

⁸⁴ *Miller v. Miller*, 187 Pa. 572, 41 Atl. 277. See, also, *Wendling v. Bowden*, 252 Mo. 647, 161 S. W. 774.

⁸⁵ *Hartman v. Strickler*, 82 Va. 225; *Chambers v. Chambers*, 61 App. Div. 299, 70 N. Y. Supp. 483.

⁸⁶ *Carroll v. Hause*, 48 N. J. Eq. 269, 22 Atl. 191, 27 Am. St. Rep. 469.

⁸⁷ *Boisauvin v. Boisauvin*, 51 N. J. Eq. 252, 27 Atl. 624; *In re Kendrick's Estate*, 130 Cal. 360, 62 Pac. 605.

⁸⁸ *Keyes v. Kimmel*, 186 Ill. 109, 57 N. E. 851; *Moyer v. Swygart*, 125 Ill. 262, 17 N. E. 450; *Fry v. Jones*, 95 Ky. 148, 24 S. W. 5, 44 Am. St. Rep. 206; *Capper v. Capper*, 172 Mass. 262, 52 N. E. 98; *Jones v. Simpson*, 171 Mass. 474, 50 N. E. 940; *Lyon v. Dada*, 111 Mich. 340, 69 N. W. 654; *Gordon v. Burris*, 153 Mo. 223, 54 S. W. 546; *Edwards v. Edwards*, 63 N. J. Eq. 224, 49 Atl. 819; *Claffey v. Ledwith*, 56 N. J. Eq. 333, 38 Atl. 433; *In re Bernsee*, 63 Hun, 628, 17 N. Y. Supp. 669; *In re Carland's Will*, 15 Misc. Rep. 355, 37 N. Y. Supp. 922; *Scattergood v. Kirk*, 192 Pa. 263, 43 Atl. 1030; *Walters v. Walters*, 89 Va. 849, 17 S. E. 515; *In re Derse's Will*, 103 Wis. 108, 79 N. W. 46.

⁸⁹ See *Michael v. Marshall*, 201 Ill. 70, 66 N. E. 273.

some jurisdictions the beneficiary is required to show affirmatively that no unfair advantage was taken of testator.⁹⁰ And where testator is under guardianship as non compos mentis, a guardian claiming as beneficiary is usually required to establish both mental capacity and such freedom of will and action as are required to render a will legally valid.⁹¹

Clergyman and Parishioner

The mere relation of priest and parishioner, coupled with the fact that the former is a legatee, does not create, according to the general rule, any presumption of undue influence such as to throw the burden of explanation upon the legatee.⁹² But the relation is peculiarly susceptible to abuse, and slight proof of activity on the beneficiary's part in procuring the execution of the will, such as suggestions regarding its contents,⁹³ dictation thereof to the draftsman in the absence of the testator,⁹⁴ intimate relations between the parties, coupled with the preparation of the will from a memorandum in the handwriting of the priest,⁹⁵ may create suspicion sufficient to make out a prima facie case of undue influence.

Similar principles govern when the beneficiary is an ecclesiastical or religious organization.⁹⁶

Attorney and Client

The general rule is that no presumption of undue influence arises from the fact that the testator's attorney was a beneficiary under the will, even though he assisted in its preparation.⁹⁷ In fact, noth-

⁹⁰ *Meek v. Perry*, 36 Miss. 190; *Bridwell v. Swank*, 84 Mo. 455 (a bequest by ward to wife of guardian held within operation of rule); *Garvin v. Williams*, 50 Mo. 206.

⁹¹ *Breed v. Pratt*, 35 Mass. (18 Pick.) 115; *In re Cowdry's Will*, 77 Vt. 359, 60 Atl. 141, 3 Ann. Cas. 70.

⁹² *Lyons v. Campbell*, 88 Ala. 462, 7 South. 250; *Collins v. Brazill*, 63 Iowa, 434, 19 N. W. 338; *Martin v. Bowdern*, 158 Mo. 379, 59 S. W. 227; *In re Sparks' Will*, 63 N. J. Eq. 242, 51 Atl. 118; *Kerrigan v. Leonard* (N. J. Pre-rog.) 8 Atl. 503; *In re Portingall's Will*, 60 Hun, 585, 15 N. Y. Supp. 486; *Figueira v. Taafe*, 6 Dem. Sur. 106; *In re Barthollic*, 1 Con. Sur. 373, 5 N. Y. Supp. 842; *McEnroe v. McEnroe*, 201 Pa. 477, 51 Atl. 327; *Collins v. Kilroy*, 1 Ont. Law Rep. 503; *PARFITT v. LAWLESS*, L. R. 2 P. & D. 462, *Dunmore Cas. Wills*, 90. Contra: *Hegney v. Head*, 126 Mo. 619, 29 S. W. 587; *Marx v. McGlynn*, 88 N. Y. 357.

⁹³ *McQueen v. Wilson*, 131 Ala. 606, 31 South. 94; *Brady v. McEnroe*, 10 Pa. Dist. R. 115.

⁹⁴ *In re Baugh's Estate*, 9 Pa. Dist. R. 459.

⁹⁵ *In re Sparks' Will*, 63 N. J. Eq. 242, 51 Atl. 118.

⁹⁶ See *Tibbe v. Kamp*, 154 Mo. 545, 54 S. W. 879, 55 S. W. 440; *In re Shannon's Will*, 11 App. Div. 581, 42 N. Y. Supp. 670; *In re Johnson's Will*, 28 Misc. Rep. 363, 59 N. Y. Supp. 906; *Appeal of Cornelius*, 199 Pa. 427, 49 Atl. 281; *Will v. Sisters of Order of St. Benedict*, 67 Minn. 335, 69 N. W. 1090.

⁹⁷ *Appeal of Livingston*, 63 Conn. 68, 26 Atl. 470; *White v. Cole* (Ky.) 47

ing could be more natural than that a testator should wish to bestow some bounty upon a trusted legal adviser. But slight circumstances in addition to such relation will throw on the beneficiary the burden of showing that testator was not unduly influenced⁹⁸ and where the relation was of short duration, and the attorney prepared the will, and directed the hand of the testatrix, who was feeble and aged, as she signed it, undue influence may be inferred,⁹⁹ as may also be the case where the attorney had obtained entire dominion over the testatrix,¹ where he had rendered little service to the testator, and there was no satisfactory evidence that the latter understood the contents of the will,² and where the codicil to the will of a testator of advanced age, prepared by his attorney, made extensive changes in the residuary provisions, to the advantage of the latter.³

Patient and Physician

While this relation is, perhaps, one of peculiar trust, yet the mere fact that the will was suggested by the physician, who wrote it at the testator's dictation, does not show undue influence;⁴ nor should the fact that the physician was a legatee, in the absence of proof that he sought to influence the testator to make a will in his favor.⁵ Evidence of transactions subsequent to the execution of the will, showing the testator to be much under the influence of his physician,

S. W. 759; *Barkley v. Association*, 153 Mo. 300, 54 S. W. 482; *Farnum v. Boyd*, 56 N. J. Eq. 766, 41 Atl. 422; *In re Kindberg's Will*, 207 N. Y. 220, 100 N. E. 789; *In re Murphy's Will*, 28 Misc. Rep. 650, 59 N. Y. Supp. 1078; *In re Smith's Will*, 36 Misc. Rep. 128, 72 N. Y. Supp. 1090; *In re Skaats' Will*, 74 Hun, 462, 26 N. Y. Supp. 494; *In re Read's Will*, 17 Misc. Rep. 195, 40 N. Y. Supp. 974; *In re Burns' Estate*, 21 Tex. Civ. App. 512, 52 S. W. 98.

In a few states, a devise or bequest to an attorney raises a presumption of undue influence. *Donovan v. Bromley*, 113 Mich. 53, 71 N. W. 523; *Gidney v. Chappell*, 26 Okl. 737, 110 Pac. 1099. See, also, *In re Morey's Estate*, 147 Cal. 495, 82 Pac. 57.

⁹⁸ *In re Banvard's Estate*, 83 N. J. Eq. 286, 89 Atl. 1024; *In re Cooper's Will*, 75 N. J. Eq. 177, 71 Atl. 676.

⁹⁹ *In re Gallup's Will*, 43 App. Div. 437, 60 N. Y. Supp. 137.

¹ *Grove v. Spiker*, 72 Md. 300, 20 Atl. 144.

² *In re Rintelen's Will*, 77 App. Div. 142, 78 N. Y. Supp. 1092.

³ *In re Soule*, 3 N. Y. Supp. 259, 22 Abb. N. O. 236. But see *Trubey v. Richardson*, 224 Ill. 136, 79 N. E. 592, reaching a contrary result where articles given to attorney were of little value.

⁴ *In re Keefe's Will*, 47 App. Div. 214, 62 N. Y. Supp. 124; *In re Cornell's Will*, 43 App. Div. 241, 60 N. Y. Supp. 53, affirmed without opinion in 163 N. Y. 608, 57 N. E. 1107; *Folks v. Folks*, 107 Ky. 561, 54 S. W. 837; *In re Widdowson's Estate*, 189 Pa. 338, 41 Atl. 977.

⁵ *In re Small's Will*, 105 App. Div. 140, 93 N. Y. Supp. 1065; *In re Cornell's Will*, 43 App. Div. 241, 60 N. Y. Supp. 53.

In some states a contrary view prevails, and where a will is made in favor of a physician, he has the burden of proving the absence of undue influence. *In re Wickes' Estate*, 139 Cal. 195, 72 Pac. 902; *Cash v. Dennis*, 159 Iowa, 18, 139 N. W. 920; *Hitt v. Terry*, 92 Miss. 671, 46 South. 829.

who was a beneficiary, does not of itself show that the will was improperly procured.⁶ In any event, the relation of physician and patient must actually exist at the time when the will was made.⁷ But where a will was made by the testator, two days prior to his death, in favor of his physician's wife, to the exclusion of the natural objects of his bounty, in whose favor a prior will had been made, and its execution was attended with secrecy, a *prima facie* case of undue influence was made out.⁸

Other Relations

The appointment of a confidential business adviser as executor of a will and a beneficiary thereunder does not of itself indicate the exercise of undue influence.⁹ But where the will was prepared by such an adviser, who procured its execution, under circumstances of secrecy, by a testatrix who was aged and feeble both in mind and body, the beneficiary must remove the suspicion of undue influence thus created.¹⁰ Relations of intimate friendship between the testator and the beneficiary raise no presumption of undue influence,¹¹ even though the beneficiary prepared the memorandum for the will;¹² and the same principle applies to a beneficiary who was housekeeper for the testator,¹³ his landlord,¹⁴ care-taker,¹⁵ or private secretary.¹⁶

⁶ *In re Cornell's Will*, 43 App. Div. 241, 60 N. Y. Supp. 53.

⁷ *Succession of Bidwell*, 52 La. Ann. 744, 27 South. 281.

⁸ *In re Keefe's Will*, 27 Misc. Rep. 618, 59 N. Y. Supp. 490. See, also, *Conklin v. Conklin*, 165 Mich. 571, 131 N. W. 154.

⁹ *In re Purcell's Estate*, 164 Cal. 300, 128 Pac. 932; *Wheeler v. Whipple*, 44 N. J. Eq. 141, 14 Atl. 275; *Waddington v. Buzby*, 45 N. J. Eq. 173, 16 Atl. 690, 14 Am. St. Rep. 706; *In re Rohe's Will*, 22 Misc. Rep. 415, 50 N. Y. Supp. 392; *In re Dwyer's Will*, 29 Misc. Rep. 382, 61 N. Y. Supp. 903; *Lamb v. Lippincott*, 115 Mich. 611, 73 N. W. 887; *Denning v. Butcher*, 91 Iowa, 425, 59 N. W. 69; *In re Douglass' Estate*, 162 Pa. 567, 29 Atl. 715. *Contra*: *Byrne v. Byrne*, 250 Mo. 632, 157 S. W. 609 (where devisee managed business of testator, his father).

¹⁰ *Waddington v. Buzby*, 43 N. J. Eq. 154, 10 Atl. 862.

¹¹ *Clarke v. Schell*, 84 Hun, 28, 31 N. Y. Supp. 1053; *Ramsdell v. Streeter*, 62 N. J. Eq. 718, 48 Atl. 575; *In re Williams*, 2 Con. Sur. 579, 15 N. Y. Supp. 828; *In re Levis' Estate*, 140 Pa. 179, 21 Atl. 242; *In re Burns' Estate*, 21 Tex. Civ. App. 512, 52 S. W. 98.

¹² *Carpenter v. Hall*, 64 Hun, 636, 19 N. Y. Supp. 778.

¹³ *Richardson v. Bly*, 181 Mass. 97, 63 N. E. 3; *In re Snelling*, 136 N. Y. 515, 32 N. E. 1006; *In re Murphy's Will*, 41 App. Div. 153, 58 N. Y. Supp. 450; *In re Bartholic*, 1 Con. Sur. 373, 5 N. Y. Supp. 842; *In re Janes*, 87 Hun, 57, 33 N. Y. Supp. 968; *Trost v. Dingler*, 118 Pa. 259, 12 Atl. 296, 4 Am. St. Rep. 593.

¹⁴ *Tallman's Will*, 9 Pa. Co. Ct. R. 357. And family of employer. *In re Harrold*, 50 Hun, 606, 3 N. Y. Supp. 316.

¹⁵ *Campbell v. Carlisle*, 162 Mo. 634, 63 S. W. 701; *In re King's Will*, 22

¹⁶ *Councill v. Mayhew*, 172 Ala. 295, 55 South. 314.

The fact that a beneficiary under a will was a partner of the testator, and that the latter lived with him and was cared for by his family, gives rise to no presumption of undue influence.¹⁷ So the fact that a partner, whose children were made beneficiaries under the will, had great influence with the testator, is insufficient to show that the will was improperly procured;¹⁸ and the same is true of a will drawn by the testator's partner, appointing himself executor, and providing for the continuance of the partnership business after the testator's death.¹⁹

Beneficiary the Writer of the Will

While there is considerable authority to the contrary,²⁰ yet the sounder and the more general rule is that the mere fact that the beneficiary wrote the will gives rise, as a matter of law, to no presumption of undue influence (i. e., this fact, alone and of itself, would not justify a court in directing a verdict for the contestants); and this is true although a fiduciary relation, such as that of attorney and client, or physician and patient, exists between the testator and the beneficiary.²¹ The fact that the sole beneficiary wrote the will raises no presumption, either of law or fact, that the testator's mind was controlled by him. This is a question of fact for the jury.²² "The fact that a party is largely benefited by a will pre-

Misc. Rep. 268, 61 N. Y. Supp. 238; Springsted's Will, 55 Hun, 603, 8 N. Y. Supp. 596; McMaster v. Scriven, 85 Wis. 162, 55 N. W. 149, 39 Am. St. Rep. 828.

¹⁷ Goodbar v. Lidlkey, 136 Ind. 1, 35 N. E. 691, 43 Am. St. Rep. 296.

¹⁸ Carpenter v. Bailey, 94 Cal. 406, 29 Pac. 1101.

¹⁹ Koegel v. Egner, 54 N. J. Eq. 623, 35 Atl. 394.

²⁰ 1 Underhill, Wills, § 137; Appeal of Richmond, 59 Conn. 226, 22 Atl. 82, 21 Am. St. Rep. 85; Appeal of Drake, 45 Conn. 9; Smith v. Smith, 174 Ala. 205, 56 South. 949; Henry v. Hall, 106 Ala. 84, 17 South. 187, 54 Am. St. Rep. 22; Beall v. Mann, 5 Ga. 456; England v. Fawbush, 204 Ill. 384, 68 N. E. 526; Webster v. Yorty, 194 Ill. 408, 62 N. E. 907; Hughes v. Meredith, 24 Ga. 325, 71 Am. Dec. 127; Duffield v. Robeson, 2 Har. (Del.) 375. See, also, Barry v. Butlin, 2 Moore, P. C. 480.

²¹ Garrett v. Heflin, 98 Ala. 615, 13 South. 326, 39 Am. St. Rep. 89; Sellards v. Kirby, 82 Kan. 291, 108 Pac. 73, 28 L. R. A. (N. S.) 270, 136 Am. St. Rep. 110, 20 Ann. Cas. 214; Appeal of O'Brien, 100 Me. 156, 60 Atl. 880; Stirling v. Stirling, 64 Md. 138, 21 Atl. 273; Carpenter v. Hatch, 64 N. H. 573, 15 Atl. 219; Bennett v. Bennett, 50 N. J. Eq. 439, 26 Atl. 573; Loder v. Whelpley, 111 N. Y. 239, 18 N. E. 874; Post v. Mason, 91 N. Y. 539, 43 Am. Rep. 689; In re Sheldon's Will (Sur.) 16 N. Y. Supp. 454; Clarke v. Schell, 84 Hun, 28, 31 N. Y. Supp. 1053; In re Suydam's Will, 84 Hun, 514, 32 N. Y. Supp. 449; In re Murphy's Will, 48 App. Div. 211, 62 N. Y. Supp. 785; In re Edson's Will, 70 Hun, 122, 24 N. Y. Supp. 71; In re Spellier's Estate, 2 Pa. Dist. R. 513.

The rule under the civil law was otherwise. There a will drawn by the beneficiary was invalid. Dig. 48, tit. 10, §§ 15, 34.

²² Carpenter v. Hatch, 64 N. H. 573, 15 Atl. 219.

pared by himself, or in the preparation of which he took an active part, is nothing more, than a suspicious circumstance, of more or less weight according to the facts of each case. If the testamentary capacity be doubtful, or if the party benefited be a stranger, not allied by ties of kindred to the testator, these and other like facts would tend, of course, to increase the suspicion."²³ The mere circumstance that the draftsman of a will is made executor or trustee does not raise a presumption of undue influence.²⁴

Whatever doubt may be excited by a beneficiary's drawing the will is removed by proof of testamentary capacity, knowledge by the testator of its provisions, and his declarations for many years after its execution that it conformed to his wishes,²⁵ by proof that under a prior will, whose integrity was not questioned, the beneficiary took more than under the will in controversy, written by himself,²⁶ and by showing that the scheme of the will had been long contemplated by the testator before his relation with the beneficiary was formed.²⁷

Although any doubt as to the testator's knowledge of the contents of the instrument is a suspicious circumstance when it is prepared by a beneficiary, yet it is not necessary to the validity of a will thus made for the proponents to show, besides the testamentary capacity of the testator and the formal execution of the instrument, the further fact, by distinct evidence, that he knew and approved of its contents.²⁸ Capacity and execution once proved, the general question as to the presence of fraud and undue influence is then for the jury.

²³ Robinson, J., in *Griffith v. Diffenderffer*, 50 Md. 466.

There are cases where the fact that a beneficiary acted as draftsman is not even a suspicious circumstance and the trial court is therefore not bound to stigmatize it as such in every case when making his charge to jury. *Stirling v. Stirling*, 64 Md. 138, 21 Atl. 273.

²⁴ *Sellards v. Kirby*, 82 Kan. 291, 108 Pac. 73, 28 L. R. A. (N. S.) 270, 36 Am. St. Rep. 110, 20 Ann. Cas. 214; *In re Thompson's Will*, 121 App. Div. 470, 106 N. Y. Supp. 111.

²⁵ *In re Reed*, 2 Con. Sur. 403, 20 N. Y. Supp. 91.

²⁶ *In re Walton's Estate*, 194 Pa. 528, 45 Atl. 426. See, also, *In re Soule*, 3 N. Y. Supp. 259, 22 Abb. N. C. 236.

²⁷ *In re Carver's Estate*, 3 Misc. Rep. 567, 23 N. Y. Supp. 753.

²⁸ *Downey v. Murphey*, 18 N. C. 82.

EVIDENCE OF UNDUE INFLUENCE

63. Any facts relevant under the rules of evidence, and supported by proper medium of proof, may be received to show the presence or absence of undue influence. They include facts relating to the testator's condition and the circumstances attending the execution of the will, the character of the dispositions contained therein, former intentions of the testator regarding the disposition of his property, and declarations of the testator and of the beneficiaries.

Testator's Condition, and Circumstances Attending Execution of Will

In determining the question of undue influence, there must be taken into consideration the state and condition of mind of the testator at the time of executing the will, his condition and relative situation as compared with that of the beneficiary, and all the circumstances under which the will was made.²⁹ From the very necessity of the case, undue influence must often be proved, if at all, by circumstantial evidence.³⁰

It is obvious that what would amount to undue influence with regard to a person of weak and impaired intellect would be wholly ineffectual to improperly affect one of resolute character and full mental power.³¹ Hence evidence of the mental and physical condition of the testator is always competent on the issue of undue influence,³² and this though the period referred to is remote from

²⁹ *Reichenbach v. Ruddach*, 127 Pa. 564, 18 Atl. 432; *Blackman v. Edsall*, 17 Colo. App. 429, 68 Pac. 790; *Kettemann v. Metzger*, 23 Ohio Cir. Ct. R. 61; *In re Tresidder's Estate*, 70 Wash. 15, 125 Pac. 1034.

³⁰ *In re Ellwanger's Will (Sur.)* 114 N. Y. Supp. 727; *Campbell v. Barrera* (Tex. Civ. App.) 32 S. W. 724.

³¹ *In re Hoffman's Estate*, 151 Mich. 595, 115 N. W. 690; *Reichenbach v. Ruddach*, 127 Pa. 564, 18 Atl. 432.

³² *Olmstead v. Webb*, 5 App. D. C. 38; *Robinson v. Robinson*, 203 Pa. 400, 53 Atl. 253; *Staser v. Hogan*, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990; *Lingle v. Lingle*, 121 Iowa, 133, 96 N. W. 708; *Bush v. Lisle*, 89 Ky. 393, 12 S. W. 762; *Sullivan v. Foley*, 112 Mich. 1, 70 N. W. 322; *In re Sperl's Estate*, 94 Minn. 421, 103 N. W. 502; *Myers v. Hauger*, 98 Mo. 433, 11 S. W. 974; *Gay v. Gillilan*, 92 Mo. 250, 5 S. W. 7, 1 Am. St. Rep. 712; *Patten v. Cilley*, 67 N. H. 520, 42 Atl. 47; *In re Bennett's Will*, 53 Hun, 634, 6 N. Y. Supp. 199; *Peck v. Belden*, 6 Dem. Sur. 299; *Perret v. Perret*, 184 Pa. 131, 39 Atl. 33; *In re Logan's Estate*, 195 Pa. 282, 45 Atl. 729; *Denny v. Pinney's Heirs*, 60 Vt. 524, 12 Atl. 108.

See, also, *Malcomsen v. Graham*, 75 Iowa, 54, 39 N. W. 179; *Manatt v. Scott*, 106 Iowa, 203, 76 N. W. 717, 68 Am. St. Rep. 293; *Campbell v. Carlisle*, 162 Mo. 634, 63 S. W. 701; *Salter v. Ely*, 56 N. J. Eq. 357, 39 Atl. 365; *In re Dunham's Will*, 48 Hun, 618, 1 N. Y. Supp. 120.

the date of the will.³³ And where the testatrix was a fairly intelligent person, who gave clear instructions to her counsel, by whom each clause was read to her, and to whose questions she made proper answers, probate of her will will not be refused on the ground of undue influence, though it appears that she was somewhat deaf, and not very familiar with the English language.³⁴ But where a testatrix, with full mental powers, made a will at the beginning of her last sickness in accordance with her previously expressed intentions, and within a few hours afterward, when unable to move or speak, executed another will without mentioning the former, there is sufficient proof of undue influence to prevent probate of the second will.³⁵ So the fact that the testator was under the influence of liquor or any other drug at the time of executing the will is relevant upon the issue of undue influence.³⁶ The feelings, either of friendship, dislike, or hostility, of the testator towards the beneficiaries under the will, or the natural objects of his bounty, who have been either disinherited or discriminated against, may be considered upon the issue of undue influence.³⁷

While secrecy in the making of a will does not of itself raise any presumption of undue influence, particularly if the testator's mind be strong and in its usual condition,³⁸ yet it is evidence to be considered in connection with other facts,³⁹ as are also attempts of the

³³ In *re Arnold's Estate*, 147 Cal. 583, 82 Pac. 252 (evidence of physical condition three years before will executed was admitted); *Staser v. Hogan*, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990.

The court has a somewhat wide discretion in fixing the limits of such time. *Barber v. Allen* (R. I.) 68 Atl. 366.

³⁴ In *re Brommer's Will*, 78 Hun, 611, 28 N. Y. Supp. 907; *Goerke v. Goerke*, 80 Wis. 516, 50 N. W. 345.

³⁵ In *re Fox's Estate*, 9 Misc. Rep. 661, 30 N. Y. Supp. 835.

³⁶ In *re Slinger's Will*, 72 Wis. 22, 37 N. W. 236; *Gay v. Gillilan*, 92 Mo. 250, 5 S. W. 7, 1 Am. St. Rep. 712; *Smith's Ex'r v. Smith*, 67 Vt. 443, 32 Atl. 255.

³⁷ *Coghill v. Kennedy*, 119 Ala. 641, 24 South. 459; *Estes v. Bridgforth*, 114 Ala. 221, 21 South. 512; *Campbell v. Carnahan* (Ark.) 13 S. W. 1098; *Cheney v. Goldy*, 225 Ill. 394, 80 N. E. 289, 116 Am. St. Rep. 145; *Staser v. Hogan*, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990; *Denning v. Butcher*, 91 Iowa, 425, 59 N. W. 69; *Betts v. Betts*, 113 Iowa, 111, 84 N. W. 975; *McHugh v. Fitzgerald*, 103 Mich. 21, 61 N. W. 354; *Carpenter v. Hatch*, 64 N. H. 573, 15 Atl. 219; In *re Bolles' Will*, 37 Misc. Rep. 562, 75 N. Y. Supp. 1062; *Gordon v. Burris*, 141 Mo. 602, 43 S. W. 642; *Collins v. Collins*, 101 N. C. 114, 7 S. E. 687; *Kettmann v. Metzger*, 23 Ohio Cir. Ct. R. 61; *Robinson v. Stuart*, 73 Tex. 267, 11 S. W. 275; *Foster's Ex'rs v. Dickerson*, 64 Vt. 233, 24 Atl. 253.

³⁸ *Tibbe v. Kamp*, 154 Mo. 545, 54 S. W. 879, 55 S. W. 440; *Fox v. Martin*, 104 Wis. 581, 80 N. W. 921.

³⁹ In *re Blair*, 16 Daly, 540, 16 N. Y. Supp. 874.

beneficiaries to exclude the natural objects of his bounty from access to the testator.⁴⁰

While the mere proof that the testator did not know the contents of the will when he signed it will not avail contestants alleging undue influence,⁴¹ yet positive proof that such knowledge was actually brought home to the testator is always significant in behalf of the proponents;⁴² and the fact that it was not read over to him, and that he did not know its contents, is admissible in a contest on this ground, as tending to show that the will did not express his real intentions.⁴³ When the circumstances are such as to overcome the usual presumption, arising from due execution, that the testator was aware of the contents of his will, such as illiteracy, ignorance of the language in which it is written, or weakness of mind, or when there is substantial suspicion that improper influence may have been exercised to procure it, the proponents must then show that the testator was aware of its contents.⁴⁴

The Character of the Will

In determining the question of undue influence, the nature of the testamentary dispositions furnish important evidence.⁴⁵ If these are unnatural and unjust, they afford an indication of undue influence,⁴⁶ though they are not, as a matter of law, sufficient to raise a presumption that the will was procured by unlawful means.⁴⁷

⁴⁰ *Coghill v. Kennedy*, 119 Ala. 641, 24 South. 459; *Walts v. Walts*, 127 Mich. 607, 86 N. W. 1030; *Davenport v. Johnson*, 182 Mass. 269, 65 N. E. 392; *Tyler v. Gardiner*, 35 N. Y. 559; *Chappell v. Trent*, 90 Va. 849, 19 S. E. 314; *Smith's Ex'r v. Smith*, 67 Vt. 443, 32 Atl. 255.

⁴¹ *Swearingen v. Inman*, 198 Ill. 255, 65 N. E. 80.

⁴² *Wilcoxon v. Wilcoxon*, 165 Ill. 454, 46 N. E. 369; *Eggers v. Anderson*, 63 N. J. Eq. 264, 49 Atl. 578, 55 L. R. A. 570.

⁴³ *Wilbur v. Wilbur*, 138 Ill. 446, 27 N. E. 701.

⁴⁴ *Comstock v. Society*, 8 Conn. 254, 20 Am. Dec. 100; *Lake v. Ranney*, 33 Barb. (N. Y.) 49; *Kelly v. Settegast*, 68 Tex. 13, 2 S. W. 870.

In the last case, the will was drawn by one of the beneficiaries, who suggested the persons present at its execution. Neither of the beneficiaries was a relative of the testator, whose will disinherited a daughter and grandchildren. The testator was illiterate. The only evidence that he was aware of its contents was the testimony of one witness that it was read over to the testator, and that the witness knew it to be the "wording of a will." Held not sufficient proof that the testator knew of its contents.

⁴⁵ *Appeal of Crandall*, 63 Conn. 365, 28 Atl. 531, 38 Am. St. Rep. 375; *Mitchell v. Mitchell*, 43 Minn. 73, 44 N. W. 885; *In re Hess' Will*, 48 Minn. 504, 51 N. W. 614, 31 Am. St. Rep. 665.

⁴⁶ *In re Blair*, 16 Daly, 540, 16 N. Y. Supp. 874; *Donnan v. Donnan*, 256 Ill. 244, 99 N. E. 931; *Sim v. Russell*, 90 Iowa, 656, 57 N. W. 601. See, also, *Farmer v. Farmer*, 129 Mo. 530, 31 S. W. 926.

⁴⁷ *Councill v. Mayhew* (1911) 172 Ala. 295, 55 South. 314; *Burney v. Torrey*, 100 Ala. 157, 14 South. 685, 46 Am. St. Rep. 33; *In re Snowball's Estate*, 157

In fact, where it is admitted that the testator was aware of its contents, and the only evidence upon the issue of undue influence is the unequal distribution of the estate among his children, a verdict in favor of the will may properly be directed by the court;⁴⁸ and this though the testator be old and physically infirm, and the children discriminated against be helpless, while the children benefited are able to take care of themselves.⁴⁹ But where a testator of this character, while away from his kinsfolk, gives all his property by will to other than relatives, a prima facie case of undue influence is made out.⁵⁰ The question as to whether a will is just and natural is for the jury, in view of all the facts; and evidence as to the actual relations between the testator, the natural objects of his bounty, and the beneficiaries, may wholly explain any inequality in the provisions of the will, or the apparently unjust exclusion of the former to the advantage of the latter.⁵¹

Prior Intention of Testator

While the mere fact that a will was not in accordance with the testator's previously expressed intentions does not prove undue influence,⁵² yet such intentions may be proved by the contestant,⁵³ and by the proponent, as showing a deliberate and fixed purpose;⁵⁴

Cal. 301, 107 Pac. 598; *McFadin v. Catron*, 138 Mo. 197, 38 S. W. 932, 39 S. W. 771; *In re Holman's Estate*, 42 Or. 345, 70 Pac. 908; *In re Budlong*, 126 N. Y. 423, 27 N. E. 945; *In re Cleveland's Will (Sur.)* 28 Misc. Rep. 369, 59 N. Y. Supp. 985; *In re Lasak*, 57 Hun, 417, 10 N. Y. Supp. 844; *In re Journeay*, 15 App. Div. 567, 44 N. Y. Supp. 548; *Bennett v. Bennett*, 50 N. J. Eq. 439, 26 Atl. 573; *Kaufman v. Caughman*, 49 S. C. 159, 27 S. E. 16, 61 Am. St. Rep. 808.

⁴⁸ *Manogue v. Herrell*, 13 App. D. C. 455; *Abrahams v. Woolley*, 243 Ill. 365, 90 N. E. 667. See, however, *Walls v. Walls*, 30 Ky. Law Rep. 948, 99 S. W. 969.

⁴⁹ *Maddox v. Maddox*, 114 Mo. 35, 21 S. W. 499, 35 Am. St. Rep. 734. See, however, *Gay v. Gillilan*, 92 Mo. 250, 5 S. W. 7, 1 Am. St. Rep. 712.

⁵⁰ *Chappell v. Trent*, 90 Va. 849, 19 S. E. 314; *In re Liney's Will (Sur.)* 13 N. Y. Supp. 551.

⁵¹ *Henry v. Hall*, 106 Ala. 84, 17 South. 187, 54 Am. St. Rep. 22; *Merri-man's Appeal*, 108 Mich. 454, 66 N. W. 372 (strained relations between testator and next of kin); *Chandler v. Jost*, 96 Ala. 596, 11 South. 636 (loans by beneficiary to testator); *Pensyl's Estate*, 157 Pa. 465, 27 Atl. 669 (efforts by sons to have testatrix put under guardianship); *Denning v. Butcher*, 91 Iowa, 425, 59 N. W. 69 (where testator had been ill-treated by relatives and aided by beneficiary). See, also, *Campbell v. McGuiggan* (N. J. Prerog.) 34 Atl. 383. See, also, *In re Skaats' Will*, 74 Hun, 462, 26 N. Y. Supp. 494.

⁵² *In re Johnson's Will (Sur.)* 7 Misc. Rep. 220, 27 N. Y. Supp. 649; *Mason v. Williams*, 53 Hun, 398, 6 N. Y. Supp. 479.

⁵³ *In re Blair*, 16 Daly, 540, 16 N. Y. Supp. 874; *Bulger v. Ross*, 98 Ala. 267, 12 South. 803.

⁵⁴ *Bulger v. Ross*, 98 Ala. 267, 12 South. 803; *Perkins v. Perkins*, 116 Iowa, 253, 90 N. W. 55; *Powers' Ex'r v. Powers* (Ky.) 52 S. W. 845; *Peninsular*

and when such intention, as expressed in the will, has existed long prior to the exercise of any alleged undue influence, the fact goes strongly to show that no such influence was exercised.⁵⁵

Prior wills are frequently introduced in evidence to show that the will in question is in harmony with or contrary to the former intention of testator.⁵⁶ And such prior wills are admissible without proof of their formal execution.⁵⁷

Declarations of Testator

Declarations of the testator made in sufficiently close connection with the execution of the will to be regarded as a part of the act are admitted as part of the *res gestæ*,⁵⁸ and they are then evidence of the truth of the facts to which they relate.

So declarations made within a reasonable time before or after the execution of the will are admissible to show the state of the testator's mind, his affection for or fear of the beneficiaries, and his regard or dislike for the natural objects of his bounty.⁵⁹ In other

Trust Co. v. Barker, 116 Mich. 333, 74 N. W. 508; *Varner v. Varner*, 16 Ohio Cir. Ct. R. 386; *Perry v. Moore*, 66 Vt. 519, 29 Atl. 806.

⁵⁵ *Peninsular Trust Co. v. Barker*, 116 Mich. 333, 74 N. W. 508.

⁵⁶ *In re Arnold's Estate*, 147 Cal. 583, 82 Pac. 252; *Freund v. Becker*, 235 Ill. 513, 85 N. E. 610; *In re Selleck's Will*, 125 Iowa, 678, 101 N. W. 453; *Simon v. Middleton*, 51 Tex. Civ. App. 531, 112 S. W. 441; *In re Young's Estate*, 33 Utah, 382, 94 Pac. 731, 17 L. R. A. (N. S.) 108, 126 Am. St. Rep. 843, 14 Ann. Cas. 596.

⁵⁷ *McConnell v. Wildes*, 153 Mass. 487, 26 N. E. 1114; *Love v. Johnston*, 34 N. C. 355; *Thornton v. Thornton*, 39 Vt. 122.

⁵⁸ *In re Arnold's Estate*, 147 Cal. 583, 82 Pac. 252; *Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71; *Comstock v. Ecclesiastical Soc.*, 8 Conn. 254, 20 Am. Dec. 100.

⁵⁹ *Coghill v. Kennedy*, 119 Ala. 641, 24 South. 459; *In re Ricks' Estate*, 160 Cal. 450, 117 Pac. 532; *Appeal of Gunn*, 63 Conn. 254, 27 Atl. 1113; *Denison's Appeal*, 29 Conn. 399; *Jones v. Grogan*, 98 Ga. 552, 25 S. E. 590; *Mallery v. Young*, 94 Ga. 804, 22 S. E. 142; *Kaenders v. Montague*, 180 Ill. 300, 54 N. E. 321; *Moore v. Gubbins*, 54 Ill. App. 163; *Staser v. Hogan*, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990; *In re Goldthorp's Estate*, 94 Iowa, 336, 62 N. W. 845, 58 Am. St. Rep. 400; *Oberdorfer v. Newberger (Ky.)* 67 S. W. 267; *Griffith v. Diffenderffer*, 50 Md. 466; *SHAILER v. BUMSTEAD*, 99 Mass. 112, *Dunmore Cas. Wills*, 93; *Bush v. Delano*, 113 Mich. 321, 71 N. W. 628; *Porter v. Throop*, 47 Mich. 313, 11 N. W. 174; *Haines v. Hayden*, 93 Mich. 332, 54 N. W. 911, 35 Am. St. Rep. 566; *Jones v. Roberts*, 37 Mo. App. 163; *Sheehan v. Kearney*, 82 Miss. 688, 21 South. 41, 35 L. R. A. 102; *Middleditch v. Williams*, 45 N. J. Eq. 726, 17 Atl. 826, 4 L. R. A. 738; *In re Potter's Will*, 161 N. Y. 84, 55 N. E. 387, reversing 17 App. Div. 267, 45 N. Y. Supp. 563; *Bowen v. Sweeney*, 63 Hun, 224, 17 N. Y. Supp. 752; *White v. Roes*, 65 Hun, 626, 20 N. Y. Supp. 520; *In re Green*, 67 Hun, 527, 22 N. Y. Supp. 1112; *In re Darling's Will*, 53 Hun, 636, 6 N. Y. Supp. 191; *Robinson v. Robinson*, 203 Pa. 400, 53 Atl. 253; *Hindman v. Van Dyke*, 153 Pa. 243, 25 Atl. 772; *Herster v. Herster*, 122 Pa. 239, 16 Atl. 342, 9 Am. St. Rep. 95; *Gardner v. Frieze*, 16 R. I. 640, 19 Atl. 113; *Campbell v. Barrera (Tex. Civ. App.)* 32 S. W. 724;

words, when the testator's mental condition is relevant, his declarations are admissible as indicia of that condition, and for no other purpose.⁶⁰ Thus they are not evidence of the truth of the facts which they purport to recite.⁶¹ And there must be other evidence of the exercise of undue influence in order to establish the existence of such influence.⁶²

In accordance with these principles, previous declarations of a testatrix consistent with the will are admissible to rebut undue influence,⁶³ as are also declarations inconsistent with the will, to aid in establishing such influence.⁶⁴ So letters written by the testator

Wallen v. Wallen, 107 Va. 131, 57 S. E. 596; *In re Loennecker's Will*, 112 Wis. 461, 88 N. W. 215; *Bryant v. Pierce*, 95 Wis. 331, 70 N. W. 297.

⁶⁰ "So it is uniformly held that the previous declarations of the testator, offered to prove the mental facts involved, are competent. Intention, purpose, mental peculiarity, and condition are mainly ascertainable through the medium afforded by the power of language. Statements and declarations, when the state of the mind is the fact to be shown, are therefore received as mental acts or conduct. The truth or falsity of the statement is of no consequence. As a narration, it is not received as evidence of the facts stated. It is only to be used as showing what manner of man he is who makes it. * * * Its weight will depend upon its significance and proximity. It may be so remote in point of time, or so altered in its import by subsequent changes in the circumstances of the maker, as to be wholly immaterial, and wisely to be rejected by the judge." *Colt, J.*, in *SHAILER v. BUMSTEAD*, 99 Mass. 412, *Dunmore Cas. Wills*, 93; *Wigmore on Ev.* § 1738.

⁶¹ *Coghill v. Kennedy*, 119 Ala. 641, 24 South. 459; *In re Kaufman's Estate*, 117 Cal. 288, 49 Pac. 192, 59 Am. St. Rep. 179; *In re Gregory's Estate*, 133 Cal. 131, 65 Pac. 315; *Appeal of Vivian*, 74 Conn. 257, 50 Atl. 797; *Towson v. Moore*, 11 App. D. C. 377; *Underwood v. Thurman*, 111 Ga. 325, 36 S. E. 788; *Gwin v. Gwin*, 5 Idaho, 271, 48 Pac. 295; *Doyle v. Doyle*, 257 Ill. 229, 100 N. E. 950; *Johnson v. Johnson*, 134 Iowa, 33, 111 N. W. 430; *Wood v. Zibble*, 131 Mich. 655, 92 N. W. 348; *Schierbaum v. Schemme*, 157 Mo. 1, 57 S. W. 526, 80 Am. St. Rep. 604; *Defoe v. Defoe*, 144 Mo. 458, 46 S. W. 433; *Gordon v. Burris*, 141 Mo. 602, 43 S. W. 642; *Doherty v. Gilmore*, 136 Mo. 414, 37 S. W. 1127; *McFadin v. Oatton*, 120 Mo. 252, 25 S. W. 506; *Pemberton v. Pemberton*, 41 N. J. Eq. 349, 7 Atl. 642; *In re Palmateer's Will*, 78 Hun, 43, 28 N. Y. Supp. 1062; *Kaufman v. Caughman*, 49 S. C. 159, 27 S. E. 16, 61 Am. St. Rep. 808; *Earp v. Edgington*, 107 Tenn. 23, 64 S. W. 40; *In re Burns' Estate*, 21 Tex. Civ. App. 512, 52 S. W. 98; *Mueller v. Pew*, 127 Wis. 288, 106 N. W. 840.

In a few instances courts have established a special exception to the hearsay rule for such declarations and have admitted them as evidence of the facts recited. *Wigmore on Ev.* § 1738, note 2, and cases there cited.

⁶² *Manogue v. Herrell*, 13 App. D. C. 455; *In re Hess' Will*, 48 Minn. 504, 51 N. W. 614, 31 Am. St. Rep. 665; *In re Dickson's Estate*, 20 Pa. Co. Ct. R. 152.

⁶³ *Kaufman v. Caughman*, 49 S. C. 159, 27 S. E. 16, 61 Am. St. Rep. 808; *Compher v. Browning*, 219 Ill. 429, 76 N. E. 678, 109 Am. St. Rep. 346; *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113; *Gardner v. Frieze*, 16 R. I. 640, 19 Atl. 113.

⁶⁴ *Denison's Appeal*, 29 Conn. 399.

to the beneficiary may be received to show the intimate relations between them.⁶⁵

The declarations must have been made at a time sufficiently proximate to the execution of the will to make them relevant, in view of all the circumstances; and this is a question resting somewhat in the discretion of the trial court,⁶⁶ whose decision is subject to reversal if such discretion is abused.⁶⁷ Thus twelve years have been held not too remote,⁶⁸ while "several years" have been regarded as rendering the declarations incompetent.⁶⁹ The date of the declarations should, of course, be made to appear.⁷⁰

Declarations of Beneficiary

Assuming that the declarations, if received, will affect only the party making them, or those who are jointly interested with him under the will, the declarations of a beneficiary made prior to the execution of the will may be received when they tend to show an actual control exercised by the declarant over the testator,⁷¹ or an intention or threat to obtain or exercise such control,⁷² or activity by the declarant in procuring a will in his favor.⁷³ It must appear, however, that the declarations had reference to the execution of the will,⁷⁴ and that they were not made at a period too remote from the time thereof.⁷⁵

⁶⁵ *Slingloff v. Bruner*, 174 Ill. 561, 51 N. E. 772. See, also, *Schieffelin v. Schieffelin*, 127 Ala. 14, 28 South. 687.

⁶⁶ *Huffman v. Graves*, 245 Ill. 440, 92 N. E. 280.

⁶⁷ *Denison's Appeal*, 29 Conn. 399.

⁶⁸ *Moore v. McDonald*, 68 Md. 321, 12 Atl. 117.

⁶⁹ *Garland v. Smith*, 127 Mo. 567, 28 S. W. 191, 29 S. W. 836. See, also, *Smith v. Keller*, 205 N. Y. 39, 98 N. E. 214, where declarations made six to ten years after execution of will were held too remote.

⁷⁰ *Mason v. Williams*, 53 Hun, 398, 6 N. Y. Supp. 479.

⁷¹ *Steele v. Helm*, 2 Marv. (Del.) 237, 43 Atl. 153; *In re Wheeler's Will*, 5 Misc. Rep. 279, 25 N. Y. Supp. 313; *Gordon v. Burris*, 141 Mo. 602, 43 S. W. 642; *Linebarger v. Linebarger*, 143 N. C. 229, 55 S. E. 709, 19 Ann. Cas. 596; *Robinson v. Robinson*, 203 Pa. 400, 53 Atl. 253.

Where the fact of the making of a declaration by a beneficiary is material, because the declaration was designed to influence the testator, such a declaration is of course admissible, since the utterance is then used merely as circumstantial evidence.

⁷² *In re Miller's Estate*, 179 Pa. 645, 36 Atl. 139, 39 L. R. A. 220; *Coghill v. Kennedy*, 119 Ala. 641, 24 South. 459; *Smith v. Henline*, 174 Ill. 184, 51 N. E. 227; *Wallis v. Luhring*, 134 Ind. 447, 34 N. E. 231; *Wall v. Dimmitt*, 114 Ky. 923, 72 S. W. 300, 24 Ky. Law Rep. 1749.

⁷³ *Wilbur v. Wilbur*, 138 Ill. 446, 27 N. E. 701; *Harrel v. Harrel*, 1 Duv. (Ky.) 203; *In re Loree's Estate*, 158 Mich. 372, 122 N. W. 623; *Perret v. Perret*, 184 Pa. 131, 39 Atl. 33.

⁷⁴ *King v. Holmes*, 84 Me. 219, 24 Atl. 819.

⁷⁵ *Garland v. Smith*, 127 Mo. 567, 28 S. W. 191, 29 S. W. 836 (holding thir-

Declarations made after the execution of the will, if against interest, are admissible if they affect the declarant only,⁷⁶ as is the case when he is the sole beneficiary, or when the will may be avoided in part by reason of undue influence. So the declarations of a joint devisee are admissible as against his co-devisee,⁷⁷ as are those of a conspirator, while carrying out the conspiracy, against his co-conspirators.⁷⁸ If the will is to be treated as a unit, the declarations of one beneficiary cannot be received to affect the rights of other several beneficiaries, in the absence of proof of conspiracy. The same principles control here as in the case of admissions regarding testamentary capacity.⁷⁹

Other Evidence Admissible

The financial condition of the natural objects of the testator's bounty may usually be proved,⁸⁰ as may also the failure of the testator to revoke the will, with full opportunity to do so;⁸¹ the residence of the testator with the beneficiaries;⁸² the disposition made of the will after its execution;⁸³ knowledge by the beneficiary of

teen years to be too remote); *Helsley v. Moss*, 52 Tex. Civ. App. 57, 113 S. W. 599 (nine years too remote).

⁷⁶ *In re Ames*, 51 Iowa, 596, 2 N. W. 408; *Capper v. Capper*, 172 Mass. 262, 52 N. E. 98; *Morris v. Stokes*, 21 Ga. 552.

So, when a will is contested on this ground, it is proper to show that the proponent has filed in the probate court a petition stating that the testator was mentally incompetent. *Wood v. Zibble*, 131 Mich. 655, 92 N. W. 348.

⁷⁷ *Smith v. Henline*, 174 Ill. 184, 51 N. E. 227 (declaration was made in presence of the other devisee).

⁷⁸ *Coghill v. Kennedy*, 119 Ala. 641, 24 South. 459. And see *In re Budlong*, 126 N. Y. 423, 27 N. E. 945.

The declarations of a conspirator made *after* execution of will but before testator's death are admissible against a co-conspirator. *Primmer v. Primmer*, 75 Iowa, 415, 39 N. W. 676.

⁷⁹ See ante, p. 123. See, also, *La Bau v. Vanderbilt*, 3 Redf. Sur. (N. Y.) 384; *SHAILER v. BUMSTEAD*, 99 Mass. 112, *Dunmore Cas. Wills*, 93; *McConnell v. Wildes*, 153 Mass. 487, 26 N. E. 1114; *Seal v. Goebel*, 31 Ohio Cir. Ct. R. 286.

⁸⁰ *Eastis v. Montgomery*, 95 Ala. 486, 11 South. 204, 36 Am. St. Rep. 227; *Oxford v. Oxford*, 136 Ga. 589, 71 S. E. 883; *Sim v. Russell*, 90 Iowa, 656, 57 N. W. 601; *Stevens v. Leonard*, 154 Ind. 67, 56 N. E. 27, 77 Am. St. Rep. 446; *Gurley v. Park*, 135 Ind. 440, 35 N. E. 279; *Mowry v. Norman*, 223 Mo. 463, 122 S. W. 724; *Hurley v. O'Brien*, 34 Or. 58, 54 Pac. 947; *In re Esterbrook's Estate*, 83 Vt. 229, 75 Atl. 1. See, however, *In re Kaufman's Estate*, 117 Cal. 288, 49 Pac. 192, 59 Am. St. Rep. 179.

⁸¹ 1 *Underhill, Wills*, § 133; *Barbour v. Moore*, 10 App. D. C. 30; *Kaul v. Brown*, 17 R. I. 14, 20 Atl. 10. The significance of this fact depends wholly upon the various circumstances of each case.

⁸² *In re Palmateer's Will*, 78 Hun, 43, 28 N. Y. Supp. 1062.

⁸³ *Livering v. Russell*, 30 Ky. Law Rep. 1185, 100 S. W. 840.

the testator's intentions;⁸⁴ the presence of the beneficiary when the will was executed;⁸⁵ dependence of the testator upon advice of the beneficiary;⁸⁶ a request by a beneficiary to a third party to induce the testator to make a will in her favor;⁸⁷ failure of a testator to provide for relatives, although he had no intercourse with them, and although they were persons of independent means;⁸⁸ the truth of a report alleged by the contestant to have been fabricated by the proponent for the purpose of injuring him in the estimation of the testator;⁸⁹ inequality of gifts made to her children by the testatrix during life;⁹⁰ acts of undue influence subsequent to the execution of the will;⁹¹ a will by a wife in favor of her husband, to rebut evidence of undue influence on her part in procuring the will in question from him in her favor;⁹² and, in general, any facts which properly may be deemed explanatory of the nature of the will.⁹³

A subscribing witness, who drew the will, may state that he observed no indication of undue influence on the mind of the testator;⁹⁴ and there seems to be no sufficient reason, in jurisdictions admitting the opinion evidence of non-experts, why a witness, after stating his opportunities for observation, might not give an opinion as to whether the testator was being unduly influenced at the time of making his will;⁹⁵ but a number of courts have refused to receive such opinion evidence.⁹⁶ There is, of course, no room for expert evidence in this connection.

⁸⁴ *In re Cornell's Will*, 43 App. Div. 241, 60 N. Y. Supp. 53 (of itself, of but little weight), affirmed 163 N. Y. 608, 57 N. E. 1107. See *Roberts v. Roberts*, 107 Wis. 213, 83 N. W. 318.

⁸⁵ *Delgado v. Gonzales* (Tex. Civ. App.) 28 S. W. 459; *Ethridge v. Bennett*, 9 Houst. (Del.) 295, 31 Atl. 813; *Pennypacker v. Pennypacker* (Pa.) 8 Atl. 634 (though this fact, of itself, is not suspicious).

⁸⁶ *In re Sparks' Will* (N. J. Prerog.) 63 N. J. Eq. 242, 51 Atl. 118.

⁸⁷ *Perkins v. Perkins*, 116 Iowa, 253, 90 N. W. 55 (as going to show lack of influence on part of beneficiary, who was the wife of testator).

⁸⁸ *Coghill v. Kennedy*, 119 Ala. 641, 24 South. 459.

⁸⁹ *Torrey v. Burney*, 113 Ala. 496, 21 South. 348.

⁹⁰ *Eastis v. Montgomery*, 93 Ala. 293, 9 South. 311.

⁹¹ *Walts v. Walts*, 127 Mich. 607, 86 N. W. 1030. See, however, *Thompson v. Bennett*, 194 Ill. 57, 62 N. E. 321.

⁹² *Appeal of Vivian*, 74 Conn. 257, 50 Atl. 797.

⁹³ *Smith v. Ryan*, 136 Iowa, 335, 112 N. W. 8 (ill health of beneficiary and his expenditures on property of testatrix); *Wood v. Rigg*, 152 Ky. 242, 153 S. W. 214 (that beneficiaries had enabled testator to pay off his debts); *Floore v. Green*, 26 Ky. Law Rep. 1073, 83 S. W. 133 (how testatrix came by her property).

⁹⁴ *Taylor v. Pegram*, 151 Ill. 106, 37 N. E. 837.

⁹⁵ See *Jones v. Grogan*, 98 Ga. 552, 25 S. E. 590.

⁹⁶ *Lehman v. Lindenmeyer*, 48 Colo. 305, 109 Pac. 956; *Chamberlayne*, *Modern Law of Ev.* § 1945, and cases there cited.

Evidence Inadmissible

On the issue of undue influence, evidence of the insanity of the wife, who was alleged to have unduly influenced the testator, is inadmissible, in the absence of proof that such insanity contributed to the alleged improper influence,⁹⁷ as is also evidence of medicines used by the testator under the same circumstances,⁹⁸ and of a contract with the beneficiary prior to the testator's marriage with her;⁹⁹ of the fact that others were more worthy of the testator's bounty than the beneficiaries under the will,¹ of the penurious character of the party alleged to have unduly influenced the testator,² of the tendencies of the principal legatee to speculate in stocks,³ and of illegal relations between sole beneficiary, husband of testatrix, and another woman.⁴

Evidence is frequently inadmissible by reason of remoteness, such as the relations between testator and his wife eight or nine years before the will was made,⁵ or an estrangement between testator and his wife, caused by the proponent, sixteen years prior to the making of the will,⁶ or a camping trip made by the testator and proponent nine years previous to the execution of the will, during which testator introduced proponent as his wife, though he had a wife then living,⁷ or of quarrels between husband and wife five and eight years before the execution of a will by her naming him sole beneficiary.⁸

⁹⁷ Appeal of Vivian, 74 Conn. 257, 50 Atl. 797.

⁹⁸ Id.

⁹⁹ Smith v. Smith, 168 Ill. 488, 48 N. E. 96.

¹ In re Merriman's Appeal, 108 Mich. 454, 66 N. W. 372.

² In re Calkins' Estate, 112 Cal. 296, 44 Pac. 577.

³ Garland v. Smith, 127 Mo. 567, 28 S. W. 191, 29 S. W. 836.

⁴ In re Hernandez's Will, 158 App. Div. 815, 144 N. Y. Supp. 150.

⁵ Batchelder v. Batchelder, 139 Mass. 1, 29 N. E. 61.

⁶ In re Shell's Estate, 28 Colo. 167, 63 Pac. 413, 53 L. R. A. 387, 89 Am. St. Rep. 181.

⁷ In re Flint's Estate, 100 Cal. 391, 34 Pac. 863. See, also, Fulton v. Free-land, 219 Mo. 494, 118 S. W. 12.

⁸ Kultz v. Jaeger, 29 App. D. C. 300.

CHAPTER VIII

EXECUTION OF WILLS

- 64. Essentials.
- 65-66. Signing.
- 67. Making or Acknowledging Signature before Witnesses.
- 68. Publication.
- 69. Request by Testator That Witnesses Sign.
- 70-71. Attestation.
- 72. What Constitutes a Competent Witness.
- 73-74. Signing by Witnesses.
- 75. Attestation in the Presence of the Testator.
- 76. Evidence of Execution.
- 77. The Significance of the Attestation Clause.
- 78. Declarations of the Testator as Evidence of Execution.

ESSENTIALS

64. Under the various statutes, some or all of the following requirements are essential to the due execution of a will:
- (a) Signing by the testator.
 - (b) The making or acknowledgment of such signature before witnesses.
 - (c) Publication of the will, as such, to the witnesses.
 - (d) Request for the signatures of the witnesses by the testator.
 - (e) Attestation by the witnesses.

The essentials of the valid execution of a will are determined wholly by statutes, whose provisions vary considerably, but the enumeration in the black-letter text embraces all of any consequence. The requirements of the statute are mandatory and must be fully met; otherwise the instrument cannot be probated as a will.¹ A will, not dated, is valid, if properly executed,² and the insertion of the date after execution does not affect its validity.³

As has already been observed, a will, though executed in due

¹ Albany Fertilizer Co. v. James, 112 Ga. 450, 37 S. E. 707; Kelly v. Parker, 181 Ill. 49, 54 N. E. 615; Hosea v. Skinner, 32 Misc. Rep. 653, 67 N. Y. Supp. 527; Brengle v. Tucker, 114 Md. 597, 80 Atl. 224; Trustees of Western Maryland College v. McKinstry, 75 Md. 188, 23 Atl. 471; Avaro v. Avaro, 235 Mo. 424, 138 S. W. 500; Sears v. Sears, 77 Ohio St. 104, 82 N. E. 1067, 17 L. R. A. (N. S.) 353, 11 Ann. Cas. 1008; Wall v. Wall, 123 Pa. 545, 16 Atl. 598, 10 Am. St. Rep. 549.

² In re Haviland's Wills, 17 Misc. Rep. 193, 40 N. Y. Supp. 973.

³ Lange v. Wiegand, 125 Mich. 647, 85 N. W. 109.

form, may yet be inoperative by lack of testamentary intent,⁴ as when it is executed in jest, or without knowledge of its contents. But due execution gives rise to a presumption that the testator knew its contents,⁵ and this presumption is not overcome by proof that it was not drawn in accordance with his instructions, but as near thereto as the law would permit, he having been told that his directions could not be entirely followed.⁶ But where the testator's instructions are not followed, and the will is signed by him without reading, on the assurance that they have been observed, it cannot operate as his will.⁷

Essentials Changed After Execution

When a change in statutory requirements is made after the execution of the will and before the death of testator, there is a conflict in the decisions as to what law should govern. Some courts hold that the will is entitled to probate, if made in accordance with the law at the time of its execution,⁸ while others insist that the will comply with the statutory requirements in force at the time of testator's death.⁹ Although it is clear that there is no constitutional restriction in the way of the legislature applying the changed requirements to wills already executed,¹⁰ the better view is that which interprets a statute effecting changes as having no retrospective operation unless from the language of the statute it is clear that the legislature intended it to be applicable to wills already made.¹¹

⁴ Ante, p. 14.

⁵ See ante, p. 14. In re Hall's Will, 5 Misc. Rep. 461, 24 N. Y. Supp. 864.

⁶ Sheer v. Sheer, 159 Ill. 591, 43 N. E. 334.

⁷ Walte v. Frisbie, 48 Minn. 420, 51 N. W. 217, following WAITE v. FRISBIE, 45 Minn. 361, 47 N. W. 1069, Dunmore Cas. Wills, 100. See, also, Bradford v. Blossom, 207 Mo. 177, 105 S. W. 289.

⁸ Lane's Appeal, 57 Conn. 182, 17 Atl. 926, 4 L. R. A. 45, 14 Am. St. Rep. 94; Mundy v. Mundy, 15 N. J. Eq. 290; Salter v. Bryan, 26 N. C. 494; Packer v. Packer, 179 Pa. 580, 36 Atl. 344, 57 Am. St. Rep. 615; Giddings v. Turgeson, 58 Vt. 106, 4 Atl. 711; Barker v. Hinton, 62 W. Va. 639, 59 S. E. 614, 13 Ann. Cas. 1150.

⁹ Learned's Estate, 70 Cal. 140, 11 Pac. 587; Sutton v. Chenault, 18 Ga. 1; Lawrence v. Hebbard, 1 Bradf. (N. Y.) 252; Langley v. Langley, 18 R. I. 618, 30 Atl. 465 (good opinion).

¹⁰ American Baptist Missionary Union v. Peck, 10 Mich. 341.

¹¹ See Schouler, Wills (2d Ed.) § 11.

The view approved seems preferable because of practical considerations. Technically, the position taken in Langley v. Langley, supra, is difficult to assail.

SIGNING

65. A will must be signed by the testator, or by some person in his presence and at his express direction and request.
66. Any completed mark or design made by the testator upon the material on which the will is written, with the intention that it shall, as a symbol, stand for or represent the testator as the written name would do, is as sufficient a signing as is the writing of the signature in full.

The cases abundantly support the rule as above stated. "Custom controls the rule of names, and so it does the rule of signatures. * * * So the form which a man customarily uses to identify and bind himself in writing is his signature, whatever shape he may choose to give it. * * * What, therefore, shall constitute a sufficient signature must largely depend on the custom of the time and place, the habit of the individual, and the circumstances of each particular case."¹² Thus a signature by a cross,¹³ or by a mark,¹⁴ is sufficient, and this though the testator was able to write at the time.¹⁵ And where the statute provides for a signature by mark when the testator "cannot write," such a signature is justified by physical incapacity,¹⁶ as well as by incapacity arising from ignorance. So a scrawl is sufficient when the testator was too weak to

¹² Mitchell, J., in *RE KNOX'S ESTATE*, 131 Pa. 220, 18 Atl. 1021, 6 L. R. A. 353, 17 Am. St. Rep. 798, Dunmore Cas. Wills, 11.

¹³ *Robinson v. Brewster*, 140 Ill. 649, 30 N. E. 683, 33 Am. St. Rep. 265; *Nickerson v. Buck*, 12 Cush. (Mass.) 332.

¹⁴ *Appeal of Reaver* (1903) 96 Md. 735, 54 Atl. 875, 94 Am. St. Rep. 610; *Schieffelin v. Schieffelin*, 127 Ala. 14, 28 South. 687; *Bevelot v. Lestrade*, 153 Ill. 625, 38 N. E. 1056; *Rook v. Wilson*, 142 Ind. 24, 41 N. E. 311, 51 Am. St. Rep. 163; *Scott v. Hawk*, 107 Iowa, 723, 77 N. W. 467, 70 Am. St. Rep. 228; *Thompson v. Thompson*, 49 Neb. 157, 68 N. W. 372; *In re Klinzner's Will*, 71 Misc. Rep. 620, 130 N. Y. Supp. 1059.

Where a testator signs by mark, it is not essential that his name be written by one of the subscribing witnesses, *Scott v. Hawk*, 107 Iowa, 723, 77 N. W. 467, 70 Am. St. Rep. 228; and if testator signed by mark, it is not material that another wrote testator's name at the end of will without any express direction to do so, *Geraghty v. Kilroy*, 103 Minn. 286, 114 N. W. 838.

¹⁵ *Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 666; *Chase v. Kittredge*, 11 Allen (Mass.) 49, 87 Am. Dec. 687; *In re Cozzens' Will*, 61 Pa. 196; *Sprague v. Luther*, 8 R. I. 252; *Baker v. Dening*, 8 Ad. & El. 94. See, however, *Greenough v. Greenough*, 11 Pa. 489, 51 Am. Dec. 567.

Probably his failure to write his name under such circumstances would, however, be suspicious.

¹⁶ *In re Gullfoyle*, 96 Cal. 598, 31 Pac. 553, 22 L. R. A. 370.

do more,¹⁷ or a signature by initials,¹⁸ or by initials engraved upon a seal and impressed upon wax affixed to the instrument,¹⁹ or by an engraved stamp.²⁰ And the writing of the wrong name about the mark made by the testator does not affect the validity of the will,²¹ neither does a misdescription of the testator in the body of the instrument.²² So the name of the testator need not appear in the body of a will signed by mark only.²³ A signature imperfectly spelled is a good signature,²⁴ as is also a signature under an assumed name,²⁵ and a signature by the first name only,²⁶ provided that this was all the signature intended. But the testator must write all that he intended to write, in order that there may be a sufficient signing, i. e., a signature that is subjectively incomplete is no signature. Thus where a testator began to sign his name, wrote the syllable "Pat," and then desisted because of physical weakness, the signature was insufficient by reason of incompleteness.²⁷ A will is regarded as signed by the testator, though his hand may have been steadied or guided by another,²⁸ and it is not necessary to prove an express request by the testator for the assistance given him.²⁹

¹⁷ In *Re Plate's Estate*, 9 Pa. Co. Ct. R. 644.

¹⁸ *PILCHER v. PILCHER* (1915) 117 Va. 356, 84 S. E. 667, L. R. A. 1915D, 902, Dunmore Cas. Wills, 98; *Re Savory*, 15 Jurist, 1042.

¹⁹ *Goods of Emerson*, L. R. 9 Ir. 443. But a sealing, not intended for a signature, does not constitute a signing. *Id.*

²⁰ *Jenkins v. Gaisford*, 3 Sw. & Tr. 93.

²¹ *Goods of Clarke*, 1 Sw. & Tr. 22. See, also, *Bailey's Heirs v. Bailey's Ex'r*, 35 Ala. 687; *Long v. Zook*, 13 Pa. 400.

²² *Goods of Douce*, 2 Sw. & Tr. 593.

²³ *Goods of Bryce*, 2 Curt. 325.

²⁴ *Word v. Whipps* (Ky.) 28 S. W. 151 (when testator wrote his name "A. J. Whpps" instead of "A. J. Whipps"); *In re Williams*, 2 Con. Sur. 579, 15 N. Y. Supp. 828 (semble); *Succession of Bradford*, 124 La. 44, 49 South. 972, 18 Ann. Cas. 766 (where testator signed as "J. W. Bradfor," although his name was "J. W. Bradford").

²⁵ *Goods of Redding*, 2 Robert. 339; *Long v. Zook*, 13 Pa. 400. See 1 Jar. Wills, 78.

²⁶ *IN RE KNOX'S ESTATE*, 131 Pa. 220, 18 Atl. 1021, 6 L. R. A. 353, 17 Am. St. Rep. 798, Dunmore Cas. Wills, 11.

²⁷ *Knapp v. Reilly*, 3 Dem. Sur. (N. Y.) 427 (the testator's full name was Patrick J. O'Neill). See, also, *In re Plate's Estate*, 148 Pa. 55, 23 Atl. 1038, 33 Am. St. Rep. 805; *Everhart v. Everhart* (C. C.) 34 Fed. 82.

²⁸ *In re Kearney's Wills*, 69 App. Div. 481, 74 N. Y. Supp. 1045; *Fritz v. Turner*, 46 N. J. Eq. 515, 22 Atl. 125; *In re Shotwell's Estate*, 11 Pa. Co. Ct. R. 444; *Sheehan v. Kearney*, 82 Miss. 688, 21 South. 41, 35 L. R. A. 102; *Wood v. Rhode Island Hospital Trust Co.*, 27 R. I. 295, 61 Atl. 757; *Trezevant v. Rains* (Tex. Sup.) 19 S. W. 567.

²⁹ *In re Cozzens' Will*, 61 Pa. 196; *Vandruff v. Rinehart*, 29 Pa. 232.

Signing by Another

Statutes usually provide for a signature by another in the presence of the testator, at his express request. What constitutes the "presence" of the testator for this purpose is determined by the same principles which govern in attestation by the subscribing witnesses.⁸⁰ Mere knowledge that the will is being signed by another, and acquiescence therein, is not sufficient to meet the requirements of these statutes.⁸¹ There must be a positive request to this end, or the adoption of the suggestion of another with regard thereto, or in some manner, either by words, looks, gestures, or unambiguous token, the positive wish on the part of the testator must be made known.⁸²

In the absence of some statutory limitation, a testator may procure another to sign his will for him, under a general provision in the statute to that end, though able to write his own signature himself; but a signature thus made would be suspicious when fraud or undue influence is alleged.⁸³

A subscribing witness to the will is as competent to sign for the testator at his request as is anybody.⁸⁴

In the absence of provision therefor in the statute,⁸⁵ the form of the signature is not very material. Thus the signature "A. for B.," the latter being the name of testator, has been held sufficient,⁸⁶

⁸⁰ See post, p. 212.

It has been held, however, that where the person directed to sign for the testatrix wrote the latter's name before coming into her presence, but later, in her presence, wrote beneath the name of the testatrix his own name, preceded by the word "by," and followed by the words "by request," there was a sufficient signing in the presence of the testatrix. *Ex parte Leonard*, 39 S. C. 518, 18 S. E. 216, 22 L. R. A. 302.

⁸¹ *WAITE v. FRISBIE*, 45 Minn. 361, 47 N. W. 1069, *Dunmore Cas. Wills*, 100; *Murry v. Hennessey*, 48 Neb. 608, 67 N. W. 470.

⁸² See *WAITE v. FRISBIE*, 45 Minn. 361, 47 N. W. 1069, *Dunmore Cas. Wills*, 100; *In re Isaac's Estate*, 76 Neb. 823, 107 N. W. 1016; *In re McCoy's Will*, 64 Neb. 150, 89 N. W. 665; *Ex parte Leonard*, 39 S. C. 518, 18 S. E. 216, 22 L. R. A. 302; *Stevens v. Stevens*, 6 Dem. Sur. 262, 3 N. Y. Supp. 131.

Thus where a testator, in response to his attorney's statement, "You can make your cross, and I can sign it for you if you so direct," replied, "Very well; do so," there was held to be a sufficient request. *In re Mullin's Estate*, 110 Cal. 252, 42 Pac. 645.

⁸³ *In re Vosburg's Will*, 9 Pa. Co. Ct. R. 243.

⁸⁴ *Riley v. Riley*, 36 Ala. 496; *Herbert v. Berrier*, 81 Ind. 1; *Robins v. Coryell*, 27 Barb. (N. Y.) 556; *Goods of Bailey*, 1 Curt. 914; *Smith v. Harris*, 1 Robert. 262.

⁸⁵ *Northcutt v. Northcutt*, 20 Mo. 266; *McGee v. Porter*, 14 Mo. 611, 55 Am. Dec. 129. The Missouri statute at this time required the person who wrote the testator's name to add his name as a subscribing witness to the will, and to state that he had written the testator's name at the latter's request.

⁸⁶ *Vernon v. Kirk*, 30 Pa. 218. See *Abraham v. Wilkins*, 17 Ark. 292.

as has also the writing of the testator's name alone,³⁷ and that of the person acting by request alone,³⁸ there appearing, however, a statement that it was signed on behalf of the testator and in his presence.

Sealing

A seal is not necessary to the validity of a will unless expressly required by statute.³⁹ And the want of a seal does not affect its validity, though it is referred to in the attestation clause as "signed and sealed."⁴⁰ Sealing is not equivalent to signing, unless the seal is intended to operate as a mark.⁴¹

Time of Signing

Where the statute does not require the signature to be at the end, it is no objection to the will that the only signature of testator was written by him on the paper before the will was completed.⁴² But under a statute requiring a signature at the end, it has been held that words written in the body of the will after testator has affixed his signature are not entitled to probate, although testator subsequently acknowledges his signature and has will attested.⁴³

Place of Signature

Under the statute of frauds, a will was merely required to be signed. Hence it was unimportant in what part of the instrument the signature appeared, provided it was placed there with the intention that it should operate as a signature. Therefore, if a testator wrote his name at the beginning of the will thus, "I, A. B.," with the design of giving it authority, and acknowledged it to be his writing when he called the subscribing witnesses to attest it, and if, at the time of the acknowledgment, he did not intend any further signature, the signing was sufficient, without any subscription of his

³⁷ In re Dombrowski's Estate, 163 Cal. 290, 125 Pac. 233; Haynes v. Haynes, 33 Ohio St. 598, 31 Am. Rep. 579.

³⁸ In re Clark, 2 Curt. 329. See, also, In re Blair, 6 Notes Cas. 529.

³⁹ Doe dem Knapp v. Pattison, 2 Blackf. (Ind.) 355; Avery v. Pixley, 4 Mass. 460; Grubbs v. McDonald, 91 Pa. 236.

Such was formerly the requirement with reference to wills of real estate in New Hampshire. Rev. St. 1842, c. 156, § 6. Such, however, is no longer the case. See Pub. Laws 1901, c. 186, § 2.

⁴⁰ Ketchum v. Stearns, 76 Mo. 396.

⁴¹ Townsend v. Pearce, 8 Vin. Abr. 102, pl. 3; Gryle v. Gryle, 2 Atk. 177.

⁴² IN RE BULLIVANT'S WILL, 82 N. J. Eq. 340, 88 Atl. 1093, 51 L. R. A. (N. S.) 169, Ann. Cas. 1915C, 72, Dunmore Cas. Wills, 102; Adams v. Field, 21 Vt. 256, and cases cited infra in note 45.

⁴³ In re Foley's Will, 76 Misc. Rep. 168, 136 N. Y. Supp. 933.

The courts, however, have usually treated testator's acknowledgment of his signature before witnesses as equivalent to a new signature. In re Kohn's Estate, 172 Mich. 342, 137 N. W. 735; Schouler on Wills (2d Ed.) § 443.

name at the end.⁴⁴ Such is the American rule, where no position for the signature is specified by statute,⁴⁵ and where the will, containing name of testator, is written for him by another, the same rule is applied on the ground that it may be treated as signed by another for him.⁴⁶

In the above statement there is little to which exception can be taken, for there is a plain adoption of the signature as such, and it is clear enough that any mark, meant to operate as a signature by the testator, can have that effect, provided this intention can be proved. But it is evident that, in principle, the mere acknowledging of an instrument as a will, or its bare subscription by witnesses, is not, of itself, an adoption of the name at the beginning or in the middle of a will as a signature; for these things are as consistent with forgetfulness that the signature at the end had not been made or with ignorance that any signature was required as with the adoption of the writing in the early parts of the instrument as a signature.⁴⁷ "When a testator or the maker of a contract subscribes it at the end and in the manner in which legal instruments are usually authenticated, a presumption arises that the signature was affixed for the purpose of creating a valid instrument. But when the name is written near the beginning of the document, where, as a rule, names are inserted by way of description of the person who is to execute it, and rarely as signatures, it must, before it can be held to have been inserted for the purpose of validating the instrument, be proved to have been written with that intent."⁴⁸

⁴⁴ *Lemayne v. Stanley*, 3 Lev. 1; *Morison v. Turnour*, 18 Ves. 176; *Ellis v. Smith*, 1 Ves. 11; *Grayson v. Atkinson*, 2 Ves. 454; *Stonehouse v. Evelyn*, 3 P. Wms. 254. See, also, 1 Jar. Wills, 70.

⁴⁵ *Armstrong's Ex'r v. Armstrong's Heirs*, 29 Ala. 538; *Merritt v. Clason*, 12 Johns. (N. Y.) 102, 7 Am. Dec. 286; *People v. Murray*, 5 Hill (N. Y.) 468; *Kolowski v. Fausz*, 103 Ill. App. 528; *In re Miles' Will*, 4 Dana (Ky.) 1; *MEADS v. EARLE*, 205 Mass. 553, 91 N. E. 916, 29 L. R. A. (N. S.) 63, *Dunmore Cas. Wills*, 106; *Hall v. Hall*, 17 Pick. (Mass.) 373; *Upchurch v. Upchurch*, 16 B. Mon. (Ky.) 102; *In re Phelan's Estate*, 82 N. J. Eq. 316, 87 Atl. (N. J.) 625; *Ramsey v. Ramsey's Ex'r*, 13 Grat. (Va.) 664, 70 Am. Dec. 438; *Selden v. Coatler*, 2 Va. Cas. 553; *Adams v. Field*, 21 Vt. 256.

⁴⁶ *Armstrong's Ex'r v. Armstrong's Heirs*, 29 Ala. 538; *Miles' Will*, 4 Dana (Ky.) 1; *Armstrong v. Walton* (1913) 105 Miss. 337, 62 South. 173, 46 L. R. A. (N. S.) 552. See, however, *Catlett v. Catlett*, 55 Mo. 330.

⁴⁷ Some of the cases cited in notes 44 and 45 are inconsistent with this view, however. See criticism on them in 1 Redf. Wills, p. 212, note, and particularly upon *Lemayne v. Stanley*, 3 Lev. 1, in which the doctrine was first declared.

⁴⁸ *Follett, C. J., in Re Booth*, 127 N. Y. 109, 27 N. E. 826, 12 L. R. A. 452, 24 Am. St. Rep. 429.

So where a will written wholly in the handwriting of the testator, and beginning, "I, A. W., declare this to be my last will," but nowhere else con-

It is sometimes held that the testator's intention to sign must be disclosed or discoverable by an inspection of the will;⁴⁹ but the sounder view is that proof of surrounding facts and circumstances, including declarations of the testator, may be received to determine his intention regarding the signature.⁵⁰ In any event, it is essential that the testator intend his signature, wherever inserted, to be an authentication of his will and that he contemplate no further signing.⁵¹

Signature at End

In view of the difficulty of determining whether a signature other than at the end of a will was intended to operate as such, statutes have frequently been passed prescribing the position of the signature, and requiring, in substance, subscription at the end. While the purpose of this legislation was commendable, it has probably served to create as much difficulty as it has removed. Upon certain points, however, there is substantial agreement. Thus, the attestation clause is not a part of the will for the purpose of determining the location of its end. Hence a signature by the testator at the end of the will proper, and before the attestation clause,⁵² or after this clause,⁵³ if it follows the will proper, or in a blank space within such clause,⁵⁴ is a sufficient signing at the end. So when the will

taining testator's name, was inclosed in a sealed envelope on which was written, in testator's handwriting, "My will. A. W.," it was held not to be signed, within the meaning of a statute providing, "No will shall be valid unless it * * * be signed by the testator * * * in such manner as to make it manifest that the name is intended as his signature." *Warwick v. Warwick*, 86 Va. 596, 10 S. E. 843, 6 L. R. A. 775, construing Code Va. 1887, § 2514, but under such a statute, the will need not necessarily be signed at the end. *Murgulondo v. Nowland's Ex'r*, 115 Va. 160, 78 S. E. 600.

⁴⁹ *Waller v. Waller*, 1 Grat. (Va.) 454, 42 Am. Dec. 564; *In re Jolly's Will*, 5 N. J. Eq. 456. See, also, *Armendariz de Acosta v. Cadena* (Tex. Civ. App.) 165 S. W. 555.

⁵⁰ *Armstrong's Ex'r v. Armstrong's Heirs*, 29 Ala. 538; *Adams v. Field*, 21 Vt. 256.

⁵¹ *Catlett v. Catlett*, 55 Mo. 330.

⁵² *Younger v. Duffie*, 94 N. Y. 535, 46 Am. Rep. 156; *Jackson v. Jackson*, 39 N. Y. 153; *In re Dayger's Will*, 110 N. Y. 666, 18 N. E. 480.

⁵³ *Younger v. Duffie*, 94 N. Y. 535, 46 Am. Rep. 156; *In re Laudy's Will*, 78 Hun, 479, 29 N. Y. Supp. 136; *In re Young's Will*, 153 Wis. 337, 141 N. W. 226.

⁵⁴ *In re De Hart's Will*, 67 Misc. Rep. 13, 122 N. Y. Supp. 220; *In re Noon's Will*, 31 Misc. Rep. 420, 65 N. Y. Supp. 568; *Goods of Walker*, 2 Sw. & Tr. 354.

See, however, *Sears v. Sears*, 77 Ohio St. 104, 82 N. E. 1067, 17 L. R. A. (N. S.) 353, 11 Ann. Cas. 1008, where it appeared that testatrix wrote her will on a printed form which contained a line for signature. Below this line was a printed attestation clause, which also contained a blank space for the name of the maker, and testatrix wrote her name only in the latter space. The court held the will invalid, but the case seems wrong, unless the policy of

has been signed at the end, and properly attested, the subsequent appending of new matter thereto does not affect the validity of the will as originally executed.⁵⁵ And if, prior to attestation, there is placed, after the signature, matter which is merely directory, and which would not be binding upon either the beneficiaries or the executor, i. e., which does not affect the disposition of the testator's property or the manner of its disposition, such matter is not sufficiently a part of the will to avoid the instrument by reason of the location of the signature.⁵⁶ A signature preceding a clause appointing executors, however, is void, as not being at the end of the will.⁵⁷

In a number of cases, the courts have been called upon to decide whether the word "end" in the statute is to be construed as meaning the logical end of the will or the physical end. The construction usually made is that which requires that the will be signed at the grammatical or logical end.⁵⁸ So where testator wrote the first page of his will, skipped the second page, filled the third page, and then finished and signed the will on the second page, the signature

the statute is taken to require that the signature be so placed as clearly to indicate an intention to execute the will.

⁵⁵ *Stevens v. Stevens*, 6 Dem. Sur. 262, 3 N. Y. Supp. 131; *SAUNDERS v. J. R. T. SAMARREG CO.*, 205 Pa. 632, 55 Atl. 763, *Dunmore Cas. Wills*, 110; *Heise v. Heise*, 31 Pa. 246; *In re Mandelick's Will*, 6 Misc. Rep. 71, 26 N. Y. Supp. 888.

See, also, *In re Taylor's Estate*, 230 Pa. 846, 79 Atl. 632, 36 L. R. A. (N. S.) 66, where, in the absence of evidence to the contrary, the court presumed that writing, beneath the signature when will offered for probate was not there at the time of execution.

⁵⁶ *In re Gibson's Will*, 128 App. Div. 769, 113 N. Y. Supp. 266 (where added paragraph contained provisions in case of death of beneficiary and the law would have made the same disposition without such paragraph); *Baker v. Baker*, 51 Ohio St. 217, 37 N. E. 125 (where the addition was a request that no bond be required of the executrix); *Wikoff's Appeal*, 15 Pa. 281, 53 Am. Dec. 597 (a memorandum stating the date when the instrument was begun). See, also, *In re Fouche's Estate*, 147 Pa. 395, 23 Atl. 547; *Conboy v. Jennings*, 1 *Thomp. & C.* (N. Y.) 622.

⁵⁷ *In re Gedney's Will*, 17 Misc. Rep. 500, 41 N. Y. Supp. 205; *APPEAL OF WINELAND*, 118 Pa. 37, 12 Atl. 301, 4 Am. St. Rep. 571, *Dunmore Cas. Wills*, 109.

The rule stated in the text is not always followed, *Ward v. Putnam*, 119 Ky. 889, 27 Ky. Law Rep. 367, 85 S. W. 179; but, on principle, it is correct, since the nomination of an executor is a testamentary act.

⁵⁸ *In re Peiser's Will*, 79 Misc. Rep. 668, 140 N. Y. Supp. 844; *Baker's Appeal*, 107 Pa. 381, 52 Am. Rep. 478; *Goods of Wotton*, L. R. 3 P. & D. 159; *Goods of Birt*, L. R. 2 P. & D. 214.

Contra and requiring a signing at the physical end: *Matter of Andrews*, 162 N. Y. 1, 56 N. E. 529, 48 L. R. A. 662, 76 Am. St. Rep. 294; *Matter of Conway*, 124 N. Y. 455, 26 N. E. 1028, 11 L. R. A. 796.

was at the end;⁵⁹ but where testator wrote a dispositive clause along the margin of the last page in his will, after he had written all of the other items in his will, and then signed under the body of the will, the will was not signed at the end.⁶⁰

It has been said that, if the matter following the signature has been sufficiently referred to in what goes before to amount to an incorporation thereof, the signature is then to be regarded as at the end,⁶¹ and there are authorities to this effect.⁶² The incongruity of permitting an incorporation by reference of matter which by the intention of testator is already an integral part of his will is apparent, and, if permitted, it should be limited in its application to cases where, in view of the form of the will and the character of the matter sought to be incorporated, there is no room for the evasion of the statute by subsequent additions to the will under the guise of incorporation by reference. Thus where a will was drawn on a printed blank covering one page, and the first two subdivisions of the will filled this, and a paper containing additional provisions was annexed to this by metal staples, being referred to in the original blank by the words, "See annexed sheet," at the bottom thereof, it was held that there was not a sufficient subscription at the end.⁶³ Of course, the mere physical attachment of a document to the instrument containing the signature does not effect a sufficient incorporation to bring the signature at the end of the will.⁶⁴

⁵⁹ *In re Stinson's Estate*, 228 Pa. 475, 77 Atl. 807, 30 L. R. A. (N. S.) 1173, 139 Am. St. Rep. 1014.

⁶⁰ *Irwin v. Jacques*, 71 Ohio St. 395, 73 N. E. 683, 69 L. R. A. 422.

Compare: *In re Swire's Estate*, 225 Pa. 188, 73 Atl. 1110, where court reached a contrary conclusion on similar facts, although insisting that the will be signed at the logical end.

⁶¹ Page, *Wills*, § 186.

⁶² *In re Brand's Will*, 68 App. Div. 225, 73 N. Y. Supp. 1073; *Baker's Appeal*, 107 Pa. 381, 52 Am. Rep. 478.

⁶³ *In re Whitney's Will*, 153 N. Y. 259, 47 N. E. 272, 60 Am. St. Rep. 616, overruling 90 Hun, 138, 35 N. Y. Supp. 798.

The same conclusion was reached in *Re Conway*, 124 N. Y. 455, 26 N. E. 1028, 11 L. R. A. 796, reversing 58 Hun, 16, 11 N. Y. Supp. 606. Here the will was written on half a sheet of paper, at the bottom of which were printed forms for signature and attestation. Part of the will was written on the first page, and at the end of such part were the words "Carried to the back of the will." On the back was the word "Continued," after which followed various provisions, at the end of which were the words "Signature on face of the will." The signature was at the bottom of the first page. See, also, *In re Andrews' Will*, 162 N. Y. 1, 56 N. E. 529, 48 L. R. A. 662, 76 Am. St. Rep. 294, affirming 43 App. Div. 394, 60 N. Y. Supp. 141.

Compare, with cases above cited, *Matter of Field*, 204 N. Y. 448, 97 N. E. 881, 39 L. R. A. (N. S.) 1060, Ann. Cas. 1913C, 842.

⁶⁴ *In re Fults' Will*, 42 App. Div. 593, 59 N. Y. Supp. 758.

The occurrence of blanks in the body of the will or the intervention of a blank between the last words of the will and the signature does not affect the validity of the latter.⁶⁵ But the intervening space may bear heavily on the question as to whether the writing was actually intended as a signature. Thus where a holographic will, written on a sheet of letter paper, ended at the middle of the second page, and the paper was folded so that the third page was outside, in the middle of which were the words, "David M. Roy's Will," this was held to be an insufficient signing.⁶⁶

On the question as to whether a will, not signed at the end, is wholly void, or void only with regard to what follows the signature, the cases are in conflict, though this may be partially explained by variations in the phraseology of the statutes involved. The prevailing rule is that the entire will is void, for the courts are hardly justified in assuming that the testator would wish one part of the will to stand in view of the fact that other portions are inoperative.⁶⁷ But the English rule is otherwise.⁶⁸

When the will covers several sheets of paper, one signature at the end is sufficient for all, although the sheets are not fastened together until after execution,⁶⁹ or even if they are not fastened at all. As a matter of precaution and to identify the sheets as a part of the will, the testator may well sign his name at the foot of each sheet. And a signature may be made upon a piece of paper attached to the body of the instrument,⁷⁰ if it be shown that the paper

⁶⁵ *Mader v. Apple*, 80 Ohio St. 691, 89 N. E. 37, 23 L. R. A. (N. S.) 515, 131 Am. St. Rep. 719; *In re Morrow's Estate* (1903) 204 Pa. 479, 54 Atl. 313; *Barnewall v. Murrell*, 108 Ala. 366, 18 South. 831; *In re Blake's Estate*, 136 Cal. 306, 68 Pac. 827, 89 Am. St. Rep. 135; *In re Dayger*, 47 Hun. 129; *In re Gilman's Will*, 38 Barb. 364; *Goods of Fuller* (1892) Prob. 377.

The courts, construing 1 Vict. c. 26 (requiring testators to sign at the foot or end of the will), held that, for the prevention of fraud by the insertion of additions, the signature must follow closely the body of the will. 1 Wms. Ex'rs, 78; *Willis v. Lowe*, 1 Robert. 618; *Smeer v. Bryer*, 6 Moore, P. C. 404. But such is no longer the case, in consequence of 15 Vict. c. 24.

⁶⁶ *Roy v. Roy's Ex'r*, 16 Grat. 418, 84 Am. Dec. 696.

⁶⁷ *Glancy v. Glancy*, 17 Ohio St. 134, 137; *In re Conway*, 124 N. Y. 455, 26 N. E. 1028, 11 L. R. A. 796; *In re Donner's Will*, 37 Misc. Rep. 57, 74 N. Y. Supp. 828; *WINELAND'S APPEAL*, 118 Pa. 37, 12 Atl. 301, 4 Am. St. Rep. 571, *Dunmore Cas. Wills*, 109. Most of the cases heretofore cited take this view for granted.

⁶⁸ *In re Anstee* (1893) Prob. 283, 1 Reports, 487; *Royle v. Harris* (1895) Prob. 163, 11 Reports, 601; *In re Gilbert*, 78 Law T. (N. S.) 762; *In re Gee*, 78 Law T. (N. S.) 843.

⁶⁹ *In re Snell*, 32 Misc. Rep. 611, 67 N. Y. Supp. 581, 8 N. Y. Ann. Cas. 366; *Gass' Heirs v. Gass' Ex'rs*, 3 Humph. (Tenn.) 285; *Ela v. Edwards*, 16 Gray (Mass.) 99; *Wikoff's Appeal*, 15 Pa. 281, 53 Am. Dec. 597.

⁷⁰ *In re Horsford*, L. R. 3 P. & D. 211; *Cook v. Lambert*, 3 Sw. & Tr. 46.

was duly fastened prior to or at the time of attestation.⁷¹ So the signature and attestation may be upon the back of the paper containing the body of the will.⁷²

MAKING OR ACKNOWLEDGING SIGNATURE BEFORE WITNESSES

67. It is frequently provided by statute that the testator shall either sign the will in the presence of the witnesses, or shall acknowledge his signature before them. Any words, acts, or conduct of the testator which, reasonably interpreted, amount to a recognition of the signature as his, in the presence of witnesses who are aware of such words, acts, or conduct, constitute a sufficient acknowledgment.

In the absence of a statutory requirement, the witnesses need not see the testator sign the will.⁷³ Where there is such a requirement, the alternative of acknowledgment is usually allowed, as the witnesses attest the signature of the testator adopted by him as his rather than the act of affixing the signature.⁷⁴

Must See the Signature

In order that there may be a valid acknowledgment of a signature, it is imperative that the witnesses see, or have an opportunity of seeing, such signature,⁷⁵ and this though the testator stated that it was his will, and read the attestation clause, which recited all the requirements of the law.⁷⁶ So where it appeared that the

⁷¹ 1 Wms. Ex'rs, 19.

⁷² In re Dayger, 47 Hun, 127.

⁷³ Woodruff v. Hundley, 127 Ala. 640, 29 South. 98, 85 Am. St. Rep. 145; Nixon v. Snellbaker, 155 Iowa, 390, 136 N. W. 223; Stirling v. Stirling, 64 Md. 138, 21 Atl. 273; Simmons v. Leonard, 91 Tenn. 183, 18 S. W. 280, 30 Am. St. Rep. 875; In re Claffin's Will, 73 Vt. 129, 50 Atl. 815, 87 Am. St. Rep. 693.

⁷⁴ Hall v. Hall, 34 Mass. (17 Pick.) 373, and cases in preceding note.

⁷⁵ NUNN v. EHLERT, 218 Mass. 471, 106 N. E. 163, L. R. A. 1915B, 87, Dunmore Cas. Wills, 112; In re Abercrombie, 24 App. Div. 407, 48 N. Y. Supp. 414; In re Laudy's Will, 14 App. Div. 160, 43 N. Y. Supp. 689; In re De Haas' Will, 9 App. Div. 561, 41 N. Y. Supp. 696; Vogel v. Lehritter, 139 N. Y. 223, 34 N. E. 914; In re Eakins' Will, 13 Misc. Rep. 557, 35 N. Y. Supp. 489; In re Hitchler's Will, 25 Misc. Rep. 365, 55 N. Y. Supp. 642; In re Coles' Will (N. J. Prerog.) 47 Atl. 385; Goods of Gunstan, L. R. 7 P. D. 102. See, also, Hobart v. Hobart, 154 Ill. 610, 39 N. E. 581, 45 Am. St. Rep. 151.

But both signing in the presence of the witnesses and acknowledgment of the signature are not necessary, and an instruction to that effect is erroneous. Webster v. Yorty, 194 Ill. 408, 62 N. E. 907.

A deed referred to in a will need not be presented and exhibited to the witnesses of the will, for a proper attestation of the latter. In re Willey's Estate, 128 Cal. 1, 60 Pac. 471.

⁷⁶ In re De Haas' Will, 9 App. Div. 561, 41 N. Y. Supp. 696.

instrument was so folded that the signature was invisible to the witnesses, it was refused probate, although they signed an attestation clause in regular form, and all other statutory provisions were complied with.⁷⁷ Where the signature was in plain sight of the witness at the time of attestation she may be presumed to have seen it, though she may have forgotten the fact, and may even think that she did not see it.⁷⁸

But where the statutes governing testamentary disposition are similar to the statute of frauds and do not require that the witnesses attest the signature, but only that they attest the will, it is sometimes held that the witnesses need not be able to see testator's signature on the will.⁷⁹

Request to Sign the Will

A presentation of the will by the testator to the witnesses, with his signature in plain sight, accompanied by the statement that it is his will, and a request that they sign it, is a sufficient acknowledgment of the signature,⁸⁰ and under these circumstances the request to sign may not be necessary.⁸¹ So a request to sign, with the signature in plain sight, may be sufficient.⁸²

Acknowledgment When Signed by Another

When the will is signed for testator by another in the absence of witnesses, a general acknowledgment by testator to subscribing witnesses that the signature is his is sufficient, and such acknowledgment need not embrace the fact that he authorized another to sign for him.⁸³

⁷⁷ *In re Mackay's Will*, 110 N. Y. 611, 18 N. E. 433, 1 L. R. A. 491, 6 Am. St. Rep. 409.

⁷⁸ *In re McDougall's Will*, 87 Hun, 349, 34 N. Y. Supp. 302; *In re Stockwell's Will*, 17 Misc. Rep. 108, 40 N. Y. Supp. 734; *In re Look*, 1 Con. Sur. 403, 5 N. Y. Supp. 50. See *In re Boardman's Will (Sur.)* 20 N. Y. Supp. 60; *In re Hennes' Estate*, 81 Minn. 30, 83 N. W. 439, and *Gould v. Chicago Theological Seminary*, 189 Ill. 282, 59 N. E. 536.

⁷⁹ *In re Dougherty's Estate*, 168 Mich. 281, 134 N. W. 24, 38 L. R. A. (N. S.) 161, Ann. Cas. 1913B, 1300; *White v. Trustees of British Museum*, 6 Bing. 310, 19 E. C. L. 145.

Contra: *NUNN v. EHLERT*, *supra*.

⁸⁰ *Canatsey v. Canatsey*, 130 Ill. 397, 22 N. E. 595; *Stewart v. Stewart*, 56 N. J. Eq. 761, 40 Atl. 438; *In re Akers' Will* (1903) 173 N. Y. 620, 66 N. E. 1103; *Baskin v. Baskin*, 36 N. Y. 416; *Stephens v. Stephens*, 129 Mo. 422, 31 S. W. 792, 50 Am. St. Rep. 454; *In re Lang's Will*, 9 Misc. Rep. 521, 30 N. Y. Supp. 388; *In re Look*, 54 Hun, 635, 7 N. Y. Supp. 298; *In re Trenor's Estate (Sur.)* 4 N. Y. Supp. 466; *Raudebaugh v. Shelley*, 6 Ohio St. 307.

⁸¹ *In re Austin*, 45 Hun, 1; *In re Gullfoyle*, 96 Cal. 598, 31 Pac. 553, 22 L. R. A. 370.

⁸² *Turner v. Cook*, 36 Ind. 129; *In re Porter's Will*, 20 App. D. C. 493; *Daintree v. Fasulo*, 13 P. D. 67.

⁸³ *Haynes v. Haynes*, 33 Ohio St. 598, 31 Am. Rep. 579.

Insufficient Acknowledgment

The mere presence of the testator when the witnesses sign is not an acknowledgment. There must be something more than simply passivity on his part.⁸⁴ Where a will purported to be signed by a mark, and a witness, who also wrote the words, "Her mark," was dead, probate was refused on the testimony of the other witness that the testatrix told him that it was her will, but that she did not tell him that she had signed, and he did not see her sign it.⁸⁵

Acknowledgment Need Not be Made to Witnesses at Same Time

Unless expressly so provided, the witnesses need not be present together when the acknowledgment is made.⁸⁶

PUBLICATION

68. It is sometimes required by statute that the testator shall declare the instrument to be his last will to the witnesses. To satisfy this requirement the testator must make known to the subscribing witnesses the fact that the instrument is his will by some assertion, or some clear assent in words or signs, and the meaning of the method employed must be unequivocal.

In the absence of a statutory requirement to that effect, the testator need not declare the instrument to be his will to the witnesses,⁸⁷ nor need they know the fact from any other source.⁸⁸ Stat-

⁸⁴ See *Luper v. Werts*, 19 Or. 122, 23 Pac. 850. See, also, *Manners v. Manners*, 72 N. J. Eq. 854, 66 Atl. 583, where acknowledgment held insufficient although scrivener said, "This is her name," but testatrix made no sign of assent.

⁸⁵ In *re Van Gelson*, 47 Hun, 5.

⁸⁶ In *re Potter's Will* (Sur.) 12 N. Y. Supp. 105; *Hoysradt v. Kingman*, 22 N. Y. 372; *Grubbs v. Marshall* (Ky.) 13 S. W. 447; *Payne v. Payne*, 54 Ark. 415, 16 S. W. 1.

⁸⁷ In *re Porter's Will*, 20 App. D. C. 493; *Palmer v. Owen*, 229 Ill. 115, 82 N. E. 275; *Scott v. Hawk*, 107 Iowa, 723, 77 N. W. 467, 70 Am. St. Rep. 228; *Skinner v. Lewis*, 40 Or. 571, 62 Pac. 523, 67 Pac. 951; In *re Kisecker's Estate*, 190 Pa. 476, 42 Atl. 886; *Gable v. Rauch*, 50 S. C. 95, 27 S. E. 555; *CLAFLIN'S WILL* (1902) 75 Vt. 19, 52 Atl. 1053, 58 L. R. A. 261, *Dunmore Cas. Wills*, 115; *Allen v. Griffin*, 69 Wis. 529, 35 N. W. 21.

In construing the provisions of the statute of frauds in regard to wills, publication by the testator was held to be necessary in *Ross v. Ewer*, 3 Atk. 156, 160 (1744). But this case was subsequently denied (see *Wyndham v. Chetwynd*, 1 Burr. 421; *Bond v. Seawell*, 3 Burr. 1775; *Wright v. Wright*, 7 Bing. 457, 20 Eng. C. L. 197), and there were contrary decisions prior thereto (see *Peate v. Oughley*, Comyns, 197). See 1 Underhill, *Wills*, § 202.

⁸⁸ The rule stated in the text is correct on principle since, if the legislature

utes requiring publication are common, however, and wills not executed in compliance therewith are void.⁸⁹ Sometimes publication must be made in the presence of the witnesses at the same time.⁹⁰

Sufficient Publication

The fact that the witnesses know that the instrument is intended as a will is not a substitute for publication, if their knowledge was not obtained from the testator.⁹¹ Equivocal acts and words, fairly susceptible of a meaning inconsistent with the publication of a will, are insufficient, though supported by a perfect attestation clause, whose contents are not made known to all the witnesses.⁹² Thus a statement by the testator, "I declare the within to be my free will and deed," is insufficient,⁹³ as is also a declaration that the instrument was "a will or agreement."⁹⁴ But any act which will indicate to the witnesses that the testator intends to give effect

has not seen fit to require a publication, the court has no right to add to the formalities necessary to make it valid. But, in Ohio, where statute does not in terms require publication the courts have required it. *Keyl v. Feuchter*, 56 Ohio St. 424, 47 N. E. 140; *Tims v. Tims*, 32 Ohio Cir. Ct. R. 506. Contra: *In re Recard*, 24 Ohio Dec. 609. And in a few cases in other jurisdictions, the necessity for a publication, in the absence of a statutory requirement, seems to have been assumed. *Ortt v. Leonhardt*, 102 Mo. App. 38, 74 S. W. 423; *Schierbaum v. Schemme*, 157 Mo. 1, 57 S. W. 526, 80 Am. St. Rep. 604; *Claflin's Will*, 73 Vt. 129, 50 Atl. 815, 87 Am. St. Rep. 693.

⁸⁹ *In re Dale*, 56 Hun, 169, 9 N. Y. Supp. 396; *In re Nevins' Will*, 4 Misc. Rep. 22, 24 N. Y. Supp. 838; *Clark v. Clark*, 64 N. J. Eq. 361, 52 Atl. 225.

The policy of such statutes is to protect parties from being fraudulently induced to execute instruments which they do not know to be wills. It may be a question whether the resulting inability to make a will in secret is sufficiently compensated for in the added protection against fraud.

⁹⁰ *Clark v. Clark*, 64 N. J. Eq. 361, 52 Atl. 225.

But such is not the case when the acknowledgment is merely required to be "in the presence of at least two credible witnesses." Here acknowledgment may be made to the witnesses separately. *Grubbs v. Marshall* (Ky.) 13 S. W. 447.

⁹¹ *Gilbert v. Knox*, 52 N. Y. 125.

⁹² *Darnell v. Buzby*, 50 N. J. Eq. 725, 26 Atl. 676; *Brinckerhoof v. Remsen*, 8 Paige, 488; *Rutherford v. Rutherford*, 1 Denio, 33, 43 Am. Dec. 644.

⁹³ *Lewis v. Lewis*, 11 N. Y. 220. Here the court say: "The fact [that the instrument is a will] must in some manner be declared by the testator in their presence, that they may not only know the fact, but that they may know it from him; * * * and to this, among other things, they are required by statute to attest. * * * The declaration that the instrument was his free will and deed was equivocal, and would be satisfied by a deed executed voluntarily. It did not necessarily inform the witnesses that it was a will by excluding every other instrument from the mind. From the expression they could not know that the testator did not suppose the instrument a deed."

⁹⁴ *Rutherford v. Rutherford*, 1 Denio, 33, 43 Am. Dec. 644.

to a paper as his will is enough,⁹⁵ such as the writing and signing of the will and the superintending of its execution,⁹⁶ or the response, "That is my will," in reply to the attorney's question, "What is this instrument?"⁹⁷ or the reply, "Yes, I do," to the question, "Do you wish M. and H. to act as witnesses to this, your will?"⁹⁸ or the remark, "It was all right," made in the presence of the witnesses after the will had been read over,⁹⁹ or a request to the witnesses to read the attestation clause.¹ So a declaration made by a third party, in the presence of the witnesses, that the instrument is the testator's will, which is adopted or acquiesced in by him, is sufficient.² All that is necessary is that enough be said and done, in the presence and with the knowledge of the testator, to inform the witnesses that the document which they are to attest is the testator's will,³ such as a request by testator for witnesses to sign, after the will had been read in the presence of testator and witnesses,⁴ or an acknowledgment by the testatrix to the witnesses that she had heard the will read, followed by the scrivener's request that they sign,⁵ or a statement by the testatrix that the will would be the same as it was then, if she should live for many years, in response to a question as to whether her will was properly drawn.⁶ So where the testator requests a witness to attend the ex-

⁹⁵ *In re Claffin's Will*, 73 Vt. 129, 50 Atl. 815, 87 Am. St. Rep. 693.

⁹⁶ *Id.*

⁹⁷ *In re Mullin's Estate*, 110 Cal. 252, 42 Pac. 645; *In re McKenna's Will* (Sur.) 4 N. Y. Supp. 458.

⁹⁸ *In re Menge's Will*, 13 Misc. Rep. 553, 35 N. Y. Supp. 493; *In re Murphy's Will*, 15 Misc. Rep. 208, 37 N. Y. Supp. 223; *In re Voorhis' Will*, 125 N. Y. 765, 26 N. E. 935.

⁹⁹ *In re Buel's Will*, 60 N. Y. Supp. 385, 44 App. Div. 4; *Schlierbaum v. Schemme*, 157 Mo. 1, 57 S. W. 526, 80 Am. St. Rep. 604.

¹ *In re Woolsey's Will*, 17 Misc. Rep. 547, 41 N. Y. Supp. 263. Or even a request to sign a paper on which the testator had written a regular attestation clause, where merely an acknowledgment that the instrument was his free act and deed was required. *Gould v. Seminary*, 189 Ill. 282, 59 N. E. 536.

² *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113 (request by the scrivener, in the presence of witnesses and testator, that the witnesses sign it as the will of the latter); *Hildreth v. Marshall*, 51 N. J. Eq. 241, 27 Atl. 465 (an announcement to the testator that the witnesses had been brought to witness his will); *Elkinton v. Brick*, 44 N. J. Eq. 154, 15 Atl. 391, 1 L. R. A. 161; *Lacey v. Dobbs*, 61 N. J. Eq. 575, 47 Atl. 481; *In re Carey's Will*, 14 Misc. Rep. 486, 36 N. Y. Supp. 817; *In re Voorhis' Will*, 54 Hun, 637, 7 N. Y. Supp. 596; *Id.*, 125 N. Y. 765, 26 N. E. 935; *Denny v. Pinney's Heirs*, 60 Vt. 524, 12 Atl. 108.

³ *Darnell v. Buzby*, 50 N. J. Eq. 725, 26 Atl. 676. See, also, *Lane v. Lane*, 95 N. Y. 494; *In re Robinson's Will*, 190 Ill. 95, 60 N. E. 194.

⁴ *Rogers v. Diamond*, 13 Ark. 474; *In re Wylie's Will*, 162 App. Div. 574, 145 N. Y. Supp. 133.

⁵ *In re Kane*, 2 Con. Sur. 249, 20 N. Y. Supp. 123.

⁶ *In re Look*, 1 Con. Sur. 403, 5 N. Y. Supp. 50.

ecution of his will at a certain time and place, and at the appointed time signs a will which he hands to the witness, there is a sufficient publication, though nothing is said at the time as to the character of the instrument.⁷

The witnesses need not know the contents of the will.⁸ Publication may immediately precede the signing by the testator,⁹ and may take place while the witnesses are in the act of signing.¹⁰ But an acknowledgment to the witnesses by the testator on a subsequent occasion, that the document signed was his will, is not such a publication as the statute requires.¹¹

Insufficient Acknowledgment

Not only must the testator use adequate means to declare that the instrument is his will, but the fact must be actually brought home to the witnesses. Hence a person who, from inattention or abstraction, is unaware of what is being said, does not witness the will, and cannot testify to its publication.¹² And a mere request to the witnesses to sign the instrument, without declaring its character, is not a publication,¹³ even though the witnesses may infer that the document was a will, the inference not arising from any words or acts of the testatrix.¹⁴

REQUEST BY TESTATOR THAT WITNESSES SIGN

69. It is a frequent, if not general, statutory requirement that the testator shall request the witnesses to attest the will. This request may be made expressly by the testator, or by another in his behalf, or may be inferred from his conduct, and from all the facts and circumstances attending the attestation.

⁷ *Robbins v. Robbins*, 50 N. J. Eq. 742, 26 Atl. 673. See, also, *In re Breinling's Estate*, 68 N. J. Eq. 553, 59 Atl. 561.

⁸ *Grimm v. Tittman*, 113 Mo. 56, 20 S. W. 664; *In re Voorhis' Will*, 125 N. Y. 765, 26 N. E. 935; *Id.*, 54 Hun, 637, 7 N. Y. Supp. 596; *Freeman v. Freeman*, 71 W. Va. 303, 76 S. E. 657.

⁹ *De Hart's Will*, 67 Misc. Rep. 13, 122 N. Y. Supp. 220; *Gamber's Will*, 53 Misc. Rep. 168, 104 N. Y. Supp. 476; *In re Williams*, 2 Con. Sur. 579, 15 N. Y. Supp. 828.

¹⁰ *In re Phillips*, 98 N. Y. 267.

¹¹ *In re Dale*, 56 Hun, 169, 9 N. Y. Supp. 396.

Compare: *In re Baldwin's Will*, 67 Misc. Rep. 329, 124 N. Y. Supp. 612, where a publication one hour after witness signed was held sufficient.

¹² *Robbins v. Robbins*, 50 N. J. Eq. 742, 26 Atl. 673.

¹³ *In re Delprat's Will*, 27 Misc. Rep. 355, 58 N. Y. Supp. 763.

¹⁴ *In re Turrell's Will*, 28 Misc. Rep. 106, 59 N. Y. Supp. 780.

Although under any statute the witnesses must sign with the knowledge and assent of the testator,¹⁵ in the absence of express legislation to this effect, the witnesses need not be requested by the testator to attest the will.¹⁶ The object of legislation making this necessary is to further safeguard the testator against fraud and imposition, and to secure him from officious interference in the performance of an act commonly regarded as very solemn. It may be doubted whether statutes of this character, requiring many formalities to the due execution of wills, do not more often serve to thwart the intentions of competent testators than to defeat the designs of unscrupulous beneficiaries, and whether they are not more productive of uncertainty and litigation than of advantage to the testamentary public. However, when a request of this character is required it, must be made; otherwise the will is void.

A Sufficient Request

Anything which conveys to the witnesses the idea that they are desired to be witnesses is a good request.¹⁷ A request therefore may be made by words, as where, in reply to his attorney's question as to whether he wished certain persons in whose presence he had just signed and acknowledged a will, to witness the same, the testator replied, "I do,"¹⁸ or by conduct, as where the testator, after signing his will in the presence of witnesses there by his request, passed it to one of them, who signed it, and then passed it to the other, who also signed.¹⁹ So a request may be implied from the fact that the witness in question drew the will and took it to his house to be executed,²⁰ or from attestation in his presence by witnesses known by him to have been procured for that purpose by

¹⁵ See *Craig v. Trotter*, 252 Ill. 228, 96 N. E. 1003; *Gross v. Burneston*, 91 Md. 383, 46 Atl. 998.

¹⁶ In *re Hull's Will*, 117 Iowa, 738, 89 N. W. 979; *Thompson v. Thompson*, 49 Neb. 157, 68 N. W. 372; *Burney v. Allen*, 125 N. C. 314, 34 S. E. 500, 74 Am. St. Rep. 637; In *re Lillibridge's Estate*, 221 Pa. 5, 69 Atl. 1121, 128 Am. St. Rep. 723.

¹⁷ In *re Miller's Estate*, 87 Mont. 545, 97 Pac. 935.

¹⁸ In *re Mullin's Estate*, 110 Cal. 252, 42 Pac. 645; In *re Voorhis' Will*, 125 N. Y. 765, 26 N. E. 935.

¹⁹ *Schierbaum v. Schemme*, 157 Mo. 1, 57 S. W. 526, 80 Am. St. Rep. 604.

So where an attorney, who had drawn a will, proposed to the testator that he and his stenographer would witness it, and thereupon called her from an adjoining room into the office, where they both signed it in the testator's presence and without objection from him, there is a sufficient request, though the testator did not personally ask the stenographer to witness the will, and may not have heard the attorney do so. *Ames v. Ames*, 40 Or. 495, 67 Pac. 737.

²⁰ In *re Woolsey's Will*, 17 Misc. Rep. 547, 41 N. Y. Supp. 263.

the draftsman of the will.²¹ So a request made by any one in the testator's presence, of which he is aware, and which is acquiesced in by him, is sufficient,²² as is also a request by the testator to one of the witnesses to sign, made in the presence of the other, and followed by attestation by both.²³

The request to the subscribing witnesses to become such may be made by the testator before he affixes his own signature, when it appears that all the formalities of execution are practically completed at one transaction,²⁴ and where an attestation clause, which was already signed by witnesses and which recited that they signed at testator's request, was read in the presence of testator and witnesses, there was such an adoption of a request to sign as to comply with a statute requiring a request.²⁵

Insufficient Request

Acquiescence in the act of attestation, in order to amount to a request therefor, must be a thoroughly conscious acquiescence. Thus where the testatrix had been under the influence of drugs for several days before the execution of the will, and there was nothing to signify her acceptance of the attestation save a nod to her husband in reply to a question, it was held that a request was not sufficiently shown.²⁶ So where a third party procured the attendance of two witnesses at the request of the testatrix, who told him that she wished "to settle" certain money, and no further proof of a request was shown, and the will contained no attestation clause, probate was refused by reason of lack of sufficient request.²⁷

²¹ *Martin v. Bowdern*, 158 Mo. 379, 59 S. W. 227; *Skinner v. Lewis*, 40 Or. 571, 62 Pac. 523, 67 Pac. 951.

²² *Rogers v. Diamond*, 13 Ark. 474; *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220; *Gilbert v. Knox*, 52 N. Y. 125; *Skinner v. Society*, 92 Wis. 209, 65 N. W. 1037.

²³ *Coffin v. Coffin*, 23 N. Y. 9, 80 Am. Dec. 235.

²⁴ *Seguine v. Seguine*, 2 Barb. (N. Y.) 385; *In re Gamber's Will*, 53 Misc. Rep. 168, 104 N. Y. Supp. 476.

²⁵ *In re Stewart's Will*, 2 Redf. Sur. (N. Y.) 77.

²⁶ *In re Lyman's Will*, 14 Misc. Rep. 352, 36 N. Y. Supp. 117.

²⁷ *In re McMulkin*, 6 Dem. Sur. (N. Y.) 347.

ATTESTATION

70. It is substantially a universal statutory requirement, save in the case of nuncupative, and, occasionally, of holographic, wills, that a will, to be valid, must be attested by a certain number of competent or credible witnesses.

71. Attestation is the bearing witness to the fact that the instrument in question is that of the maker, as evidenced by the subscription of the witness.

Attestation of wills of real property was required by the statute of frauds,²⁸ but in England, prior to 1838, wills of personal property were valid without attestation.²⁹ But by the wills act of 1838,³⁰ and by most American statutes, wills of either sort of property must be witnessed, though sometimes a greater number of witnesses is required for a will of real than of personal property.³¹ A will not executed in compliance with these requirements is void,³² and a judgment admitting such a will to probate has been held an absolute nullity, whose invalidity may be taken advantage of at any time.³³

These statutes usually require that the will be attested and subscribed. A distinction between attestation and subscription is sometimes attempted,³⁴ and has also been denied.³⁵ The definition in the black-letter text avoids any difficulty on this score and is justified by the fact that the courts require the names of the witnesses to be subscribed when the statute merely provides that the will must be "attested."³⁶

²⁸ 29 Car. II, c. 3 (1677).

²⁹ 1 Wms. Ex'rs, 84.

³⁰ 1 Vict. c. 26, § 9.

³¹ Hays v. Ernest, 32 Fla. 18, 13 South. 451.

³² Clark v. Miller, 65 Kan. 728, 68 Pac. 1071, 70 Pac. 586; Murdock v. Bridges, 91 Me. 124, 39 Atl. 475; Tobin v. Haack, 79 Minn. 101, 81 N. W. 758; Johnson v. Planting Co., 77 Miss. 15, 26 South. 360; Perea v. Barela, 5 N. M. 458, 23 Pac. 766; Simmons v. Leonard, 91 Tenn. 183, 18 S. W. 280, 30 Am. St. Rep. 875.

³³ Fortner v. Wiggins, 121 Ga. 26, 48 S. E. 694; Oureton v. Taylor, 89 Ga. 490, 15 S. E. 643. These Georgia cases seem incorrect on principle. Since the court has jurisdiction, its decree granting probate should be conclusive upon the question of due execution when collaterally attacked. See post, Effect of Probate, 11 Ch. § 97.

³⁴ Swift v. Wiley, 1 B. Mon. (Ky.) 114; Chase v. Kittredge, 11 Allen (Mass.) 49, 87 Am. Dec. 687; Tobin v. Haack, 79 Minn. 101, 81 N. W. 758.

³⁵ Skinner v. Society, 92 Wis. 209, 65 N. W. 1037.

³⁶ International Trust Co. v. Anthony, 45 Colo. 474, 101 Pac. 781, 22 L. R. A. (N. S.) 1002, 16 Ann. Cas. 1087; In re Sloan's Estate, 184 Ill. 579, 56 N. E. 952; In re Paxson's Estate, 221 Pa. 98, 70 Atl. 280.

When the statute requires that the will be "witnessed" by two compe-

The witnesses must attest the fact that the instrument is that of the maker, and that it is his will, when publication of that fact is required. Hence when the maker does not indicate the character of the paper, or exhibit the signature, or acknowledge that he has signed it, there can be no valid attestation.³⁷ The act of attestation is complete when the witnesses have signed their names to the will in the presence of the testator.³⁸

The number of witnesses required depends wholly upon local legislation. Following the English statutes, two is the more common number, but three is not infrequent, and this is the number generally required in New England, and also in several of the Southern states. The attestation by a superfluous witness who is incompetent, or who does not attest the instrument in a proper manner, does not affect the validity of the will if properly attested by the requisite number of competent witnesses.³⁹

WHAT CONSTITUTES A COMPETENT WITNESS

72. A competent or credible witness to a will is one who is qualified to testify, under the rules of evidence, in a proceeding for the probate of the will.

Statutes in this connection use the words "credible"⁴⁰ or "competent," the latter being employed more frequently. Both terms have precisely the same meaning,⁴¹ viz., that stated in the black-letter text.⁴² Hence a witness, for this purpose, may be credible,

tent witnesses, it is essential that the witnesses subscribe their names. *Matter of Boyeus*, 23 Iowa, 354.

³⁷ *Richardson v. Orth*, 40 Or. 252, 66 Pac. 925, 69 Pac. 455; *Tobin v. Haack*, 79 Minn. 101, 81 N. W. 758.

³⁸ *Mays v. Mays*, 114 Mo. 536, 21 S. W. 921.

³⁹ *In re Sizer's Will*, 129 App. Div. 7, 113 N. Y. Supp. 210, affirmed *Id.*, 195 N. Y. 528, 88 N. E. 1132; *Boone v. Lewis*, 103 N. C. 40, 9 S. E. 644, 14 Am. St. Rep. 783; *Scattergood v. Kirk*, 192 Pa. 263, 43 Atl. 1030.

⁴⁰ 29 Car. II, c. 3.

⁴¹ *Johnson v. Johnson*, 187 Ill. 86, 58 N. E. 237; *In re Noble's Estate*, 22 Ill. App. 535; *In re Marston*, 79 Me. 25, 8 Atl. 87; *Jones v. Larabee*, 47 Me. 474; *Amory v. Fellowes*, 5 Mass. 219; *Haven v. Hilliard*, 23 Pick. (Mass.) 10; *Swanzy v. Kolb*, 94 Miss. 10, 46 South. 549, 136 Am. St. Rep. 568, 18 Ann. Cas. 1089.

⁴² *Robinson v. Savage*, 124 Ill. 266, 15 N. E. 850; *Hiatt v. McColley* (1908) 171 Ind. 91, 85 N. E. 772; *Fuller v. Fuller*, 83 Ky. 345; *Vrooman v. Powers*, 47 Ohio St. 191, 24 N. E. 267, 8 L. R. A. 39.

though quite unworthy of credit.⁴³ A witness to a will need not, of necessity, be a person of veracity.⁴⁴

Time When Competency must Exist

The competency of an attesting witness to a will is to be tested by the facts existing at the time of attestation.⁴⁵ If then competent, any subsequent incompetency will not prevent the probate of the will,⁴⁶ and if then incompetent subsequently acquired competency will not validate the will.⁴⁷

Competency Determined by Reference to Statute or Common Law

The competency of a witness to a will is to be determined by the common-law rules regarding the competency of witnesses in general, as modified by legislation. Some statutes, changing the common-law disqualifications, expressly exempt witnesses to wills from their operation, while others include witnesses of every description. The controlling principle is thus stated by a learned judge: "A competent witness * * * is one who is entitled to be examined in a court of justice. * * * He must be so situated, in respect to the issue depending between parties to a cause or proceeding, or to the particular fact concerning which he is called to testify, and must have such sense of the obligations of an oath, as to come within the class of persons whom the common law deems it wise and safe to admit to give testimony. In general, if a witness is not wanting in religious belief, if he has not been rendered infamous by conviction of crime, and has no pecuniary interest in the event of the suit in which he is called to testify, he is admissible and competent as a witness."⁴⁸

⁴³ In re Noble's Estate, 22 Ill. App. 535.

It is therefore error for the court to charge the jury in a will contest that they must find that the witnesses were credible persons, thus using the word credible in reference to the character of the subscribing witnesses. *Savage v. Bulger*, 77 S. W. 717, 25 Ky. Law Rep. 1269; *Fuller v. Fuller*, 83 Ky. 345.

⁴⁴ *Johnson v. Johnson*, 187 Ill. 86, 58 N. E. 237. See, also, In re Klinzner's Will, 71 Misc. Rep. 620, 130 N. Y. Supp. 1059.

⁴⁵ *Johnson v. Johnson*, 187 Ill. 86, 58 N. E. 237; *Patten v. Tallman*, 27 Me. 17; IN RE HOLT'S WILL, 56 Minn. 33, 57 N. W. 219, 22 L. R. A. 481, 45 Am. St. Rep. 434, Dunmore Cas. Wills, 124; *Hawes v. Humphrey*, 9 Pick. (Mass.) 350, 20 Am. Dec. 481; *Carlton v. Carlton*, 40 N. H. 14; *Morton v. Ingram*, 33 N. C. 368; *Taylor v. Taylor*, 1 Rich. Law (S. C.) 531; *Search's Appeal*, 13 Pa. 108; *Bruce v. Shuler*, 108 Va. 670, 62 S. E. 973, 35 L. R. A. (N. S.) 686, 15 Ann. Cas. 887.

⁴⁶ In re Delavergne's Will, 259 Ill. 589, 102 N. E. 1081; *Amory v. Fellowes*, 5 Mass. 219, 229; *Sears v. Dillingham*, 12 Mass. 358; IN RE HOLT'S WILL, 56 Minn. 33, 57 N. W. 219, 22 L. R. A. 481, 45 Am. St. Rep. 434, Dunmore Cas. Wills, 124; *Smith v. Jones*, 68 Vt. 132, 34 Atl. 424 (by statute).

⁴⁷ *Warren v. Baxter*, 48 Me. 193; *Morton v. Ingram*, 33 N. C. 368; 1 Greenl. Evid. § 69.

⁴⁸ *Bigelow, C. J.*, in SPARHAWK v. SPARHAWK, 10 Allen (Mass.) 155, Dunmore Cas. Wills, 120.

Lunatics, Idiots, Women, and Infants as Witnesses

Legislation amendatory of the common law of evidence respecting witnesses has not attempted to remove natural disqualifications. Accordingly, one under the disability of lunacy or idiocy is incompetent as a witness to a will, where his derangement is such as substantially to negative trustworthiness upon the subject of his testimony.⁴⁹

At common law, there was no testimonial disability based merely on sex.⁵⁰ A woman is therefore a competent witness to a will of another than her husband, unless disabled by statute.⁵¹

An infant above the age of fourteen is presumed to be competent,⁵² as one younger than this is presumed not to be,⁵³ but both these presumptions may be rebutted.⁵⁴

Disqualification by Reason of Conviction for Infamous Crime

The common-law disqualification from giving testimony by reason of conviction of an infamous crime has been generally removed by statute,⁵⁵ but it still exists in Massachusetts in respect to the attestation of wills.⁵⁶

Disqualification by Reason of Interest

A person beneficially interested under a will is disqualified from acting as a witness thereto,⁵⁷ and, in the absence of some provision therefor by statute, a will, thus attested, is void.⁵⁸ But the question of the witness's interest is not determined by the terms of the will alone, but with reference to his status had there been no will. If, as heir, he would have taken as much as, or more than, he takes as beneficiary, he is not interested in sustaining the will, and he is then a competent witness.⁵⁹

⁴⁹ Wigmore on Evidence, § 492.

⁵⁰ Id. § 517.

⁵¹ Women were formerly thus disabled in Louisiana. Roth's Succession, 31 La. Ann. 315. But, under Act No. 30 of 1908 women are now incapable of being witnesses only to wills of their husbands.

⁵² Jones v. Tebbetts, 57 Me. 572.

⁵³ Carlton v. Carlton, 40 N. H. 14.

⁵⁴ Id.

⁵⁵ Robinson v. Savage, 124 Ill. 266, 15 N. E. 850.

⁵⁶ O'Connell v. Dow, 182 Mass. 541, 66 N. E. 788.

⁵⁷ SPARHAWK v. SPARHAWK, 10 Allen (Mass.) 155, Dunmore Cas. Wills, 120; Haven v. Hilliard, 23 Pick. (Mass.) 10; Lord v. Lord, 58 N. H. 7, 42 Am. Rep. 565; Frink v. Pond, 46 N. H. 125; Hindson v. Kersey, 1 Burr. 97; Wiley v. Gordan, 181 Ind. 252, 104 N. E. 500; Bruce v. Shuler, 108 Va. 670, 62 S. E. 973, 35 L. R. A. (N. S.) 686, 15 Ann. Cas. 887.

⁵⁸ Holdfast v. Dowsing, 2 Str. 1253.

⁵⁹ Smalley v. Smalley, 70 Me. 545, 35 Am. Rep. 353 (where a son who was a witness was given one dollar, when, as heir, he would have taken a larger amount); SPARHAWK v. SPARHAWK, 10 Allen (Mass.) 155, Dunmore Cas.

The interest, to disqualify, must be immediate and direct, coming to the witness from the will itself, and not, the marriage relation aside, from relationship to a beneficiary. Thus the heir of a devisee is a competent witness,⁶⁰ as is also a property owner in a town which takes as beneficiary under the will,⁶¹ a pewholder in a church,⁶² the members of an incorporated charitable association,⁶³ and a stockholder in a hall association.⁶⁴ And a provision in a will that one who signed as a witness should be employed by the executor as his attorney would not disqualify such person as a witness.⁶⁵

While it is said that the interest which will disqualify a person from being a witness must be a present, certain, vested interest, and not uncertain and contingent,⁶⁶ yet the fact that the beneficiary's interest may depend upon the happening of a contingency prior to the testator's death will not render him a competent witness, even though the contingency does not occur.⁶⁷ One who is a direct beneficiary under a trust created by a will is disqualified as a witness by reason of his interest.⁶⁸

There is strong authority for the proposition that a release by a witness of his interest under the will will render him competent,⁶⁹ and the general trend of the cases appears to favor this view.⁷⁰ But there is some support for the contrary view,⁷¹ which is in accord with the rule that competency must exist at the time of attestation.

Wills, 120 (where one of the witnesses, an heir, received nothing). See, also, *Strawn v. Shank*, 110 Pa. 259, 262, 20 Atl. 717; *In re Hoppe's Will*, 102 Wis. 54, 78 N. W. 183.

⁶⁰ *Maxwell v. Hill*, 89 Tenn. 584, 15 S. W. 253.

⁶¹ *Hitchcock v. Shaw*, 160 Mass. 140, 35 N. E. 671 (where money was given for the maintenance of a public library); *Hawes v. Humphrey*, 9 Pick. (Mass.) 350, 20 Am. Dec. 481 (where money was given for the establishment of a public school); *In re Marston*, 79 Me. 25, 8 Atl. 87 (a bequest to a town in trust for the worthy poor).

⁶² *Warren v. Baxter*, 48 Me. 193; *Conrades v. Heller*, 119 Md. 448, 87 Atl. 28.

⁶³ *Will v. Sisters of Order, etc.*, 67 Minn. 335, 69 N. W. 1090.

⁶⁴ *In re Marston*, 79 Me. 25, 8 Atl. 87.

⁶⁵ *In re Rehard's Estate*, 163 Iowa, 310, 143 N. W. 1106; *In re Pickett's Will*, 49 Or. 127, 89 Pac. 377.

⁶⁶ *Warren v. Baxter*, 48 Me. 193; *Hawes v. Humphrey*, 9 Pick. (Mass.) 361, 20 Am. Dec. 481; 1 Greenl. Ev. § 390.

⁶⁷ *In re Trinitarian Congregational Church*, 91 Me. 416, 40 Atl. 325.

⁶⁸ *In re Fleetwood*, L. R. 15 Ch. D. 594, 609.

⁶⁹ *Shaffer v. Corbett*, 3 Har. & McH. (Md.) 513; *Lowe v. Jolliffe*, 1 W. Bl. 305; *Goodtitle v. Welford*, Doug. 139; *In re Berrien's Will*, 58 Hun, 610, 12 N. Y. Supp. 585; *Dickson v. Bates*, 2 Bay (S. C.) 448.

⁷⁰ 1 Underhill, Wills, § 192, and cases cited.

⁷¹ *Smith v. Goodell*, 258 Ill. 145, 101 N. E. 255; *Fisher v. Spence*, 150 Ill. 253, 37 N. E. 314, 41 Am. St. Rep. 360; *Allison v. Allison*, 11 N. C. 141.

Statutes as Affecting the Question

Modern legislation is in line with the view that a release of interest will remove the disqualification, it being generally provided by statute that all beneficial devises and legacies to attesting witnesses shall be void, and the witnesses shall thereby be rendered competent.⁷² Usually, if there are enough competent witnesses who are not beneficiaries, a bequest to a superfluous witness is excepted from the operation of the statute.⁷³

Husband or Wife as Witnesses

At common law, by virtue of their legal identity, a wife is not a competent witness to her husband's will,⁷⁴ nor is a husband to his wife's will.⁷⁵ For the same reason, coupled with a supposed community of interest, at common law and under many modern statutes, neither husband nor wife is a competent witness to a will under which the other is a beneficiary.⁷⁶ But where the general disqualification of husband and wife to testify by reason of interest has been removed by statute the tendency of the modern cases is to hold that each may be a competent witness to a will under which the other is a beneficiary,⁷⁷ and this though the husband be also appointed executor.⁷⁸ And it has been held that a wife is not sufficiently interested in a will under which her husband was a legatee to disqualify her as a witness under a statute disqualifying an interested witness.⁷⁹

⁷² This legislation largely follows 25 Geo. II, c. 6, and 1 Vict. c. 26; *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113; *Elliot v. Brent*, 6 Mackey (D. C.) 98.

It is sometimes provided that such a witness shall be entitled to the same share as he would have inherited. See *Grimm v. Tittman*, 113 Me. 56, 20 S. W. 664.

⁷³ *In re Owen* (Sur.) 26 Misc. Rep. 179, 56 N. Y. Supp. 853 (where a will to which a legatee was a witness was afterwards republished by a codicil to which he was not a witness). And see *Scattergood v. Kirk*, 192 Pa. 263, 43 Atl. 1030.

⁷⁴ *Pease v. Allis*, 110 Mass. 157, 14 Am. Rep. 591.

⁷⁵ *Dickinson v. Dickinson*, 61 Pa. 401.

⁷⁶ *Belledin v. Gooley*, 157 Ind. 49, 60 N. E. 706; *Hodgman v. Kittredge*, 67 N. H. 254, 32 Atl. 158, 68 Am. St. Rep. 661; *Sullivan v. Sullivan*, 106 Mass. 474, 8 Am. Rep. 356; *Winslow v. Kimball*, 25 Me. 493; *Rucker v. Lambdin*, 20 Miss. (12 Smedes & M.) 230; *Giddings v. Turgeon*, 58 Vt. 106, 4 Atl. 711; *Hatfield v. Thorp*, 3 B. & Ald. 589; *Aplin v. Stone* [1904] 1 Ch. 543, 4 B. R. C. 704.

⁷⁷ *White v. Bower*, 56 Colo. 575, 136 Pac. 1053; *Bates v. Officer*, 70 Iowa, 843, 30 N. W. 608; *Lanning v. Gay*, 70 Kan. 353, 78 Pac. 810, 85 Pac. 407; *IN RE HOLT'S WILL*, 56 Minn. 33, 57 N. W. 219, 22 L. R. A. 481, 45 Am. St. Rep. 434, *Dunmore Cas. Wills*, 124; *Lippincott v. Wikoff*, 54 N. J. Eq. 107, 33 Atl. 305; *Gamble v. Butchee*, 87 Tex. 643, 30 S. W. 861.

⁷⁸ *Lippincott v. Wikoff*, 54 N. J. Eq. 107, 33 Atl. 305.

⁷⁹ *Hawkins v. Hawkins*, 54 Iowa, 443, 6 N. W. 699. See, also, *Gamble v.*

It has sometimes been held that a bequest to a husband or wife in a will to which the other was a witness may be avoided as within the purview of the statutes avoiding bequests to attesting witnesses for the purpose of rendering them competent to testify, and that thus the will may be probated and operate as it would have operated had the immediate beneficiary been a witness.⁸⁰ But this view amounts to judicial legislation. It is based "rather upon a conjecture of the unexpressed intent of the Legislature, or upon a consideration of what they might wisely have enacted, than upon a sound judicial exposition of the statute by which their intent has been manifested."⁸¹ The sounder view is that assuming the witness, under these circumstances, to have any interest at all, it cannot be removed by canceling the bequest to the immediate beneficiary.⁸²

Other Parties as Witnesses

While there is some authority to the effect that an executor is sufficiently interested in a will by reason of the commissions to which he may be entitled for services rendered as such to disqualify him from acting as a witness,⁸³ yet this ground has generally been regarded as insufficient, and much the prevailing rule is that an executor is not disqualified from acting as a witness.⁸⁴ The wife

Butchee, 87 Tex. 643, 30 S. W. 861; *IN RE HOLT'S WILL*, 56 Minn. 33, 57 N. W. 219, 22 L. R. A. 481, 45 Am. St. Rep. 434, Dunmore Cas. Wills, 124.

The husband of a wholly disinherited heir is a competent witness. *Slingloff v. Bruner*, 174 Ill. 561, 51 N. E. 772.

⁸⁰ *Kaufman v. Murray* (1914) 182 Ind. 372, 105 N. E. 466; *Winslow v. Kimball*, 25 Me. 493; *Fortune v. Buck*, 23 Conn. 1; *Jackson v. Durland*, 2 Johns. Cas. (N. Y.) 314; *Jackson v. Woods*, 1 Johns. Cas. (N. Y.) 163. And see *Key v. Weathersbee*, 43 S. C. 414, 21 S. E. 324, 49 Am. St. Rep. 846 (under a statute in terms providing for this result).

⁸¹ Gray, J., in *Sullivan v. Sullivan*, 106 Mass. 475, 8 Am. Rep. 356.

The statute sometimes expressly provides that a husband or wife of a beneficiary may be a competent witness, but that nothing shall pass under the will to the husband or wife of such witness. See *Rowlett v. Moore*, 252 Ill. 436, 96 N. E. 835, Ann. Cas. 1912D, 346.

⁸² *Sullivan v. Sullivan*, 106 Mass. 475, 8 Am. Rep. 356; *IN RE HOLT'S WILL*, 56 Minn. 33, 57 N. W. 219, 22 L. R. A. 481, 45 Am. St. Rep. 434, Dunmore Cas. Wills, 124; *Fisher v. Spence*, 150 Ill. 253, 37 N. E. 314, 41 Am. St. Rep. 360.

⁸³ *Tucker v. Tucker*, 27 N. C. 161; *Allison's Ex'rs v. Allison*, 11 N. C. 141; *Taylor v. Taylor*, 1 Rich. Law (S. C.) 531.

This doctrine, however, was held to apply only to wills of personalty. It was admitted that an executor of a will disposing of realty only might be a witness thereof. See, also, *Bettison v. Bromley*, 12 East, 250.

In Illinois, an executor, as to his competency, is placed in the same class with a devisee or legatee. *Fearn v. Postlethwaite*, 240 Ill. 626, 88 N. E. 1057; *Jones v. Grieser*, 238 Ill. 183, 87 N. E. 295, 15 Ann. Cas. 787.

⁸⁴ *Sears v. Dillingham*, 12 Mass. 358; *Richardson v. Richardson*, 35 Vt. 238; *Orndorff v. Hummer*, 12 B. Mon. (Ky.) 619; *Rucker v. Lambdin*, 12 Smedes &

of an executor is a competent attesting witness.⁸⁵ So a judge of probate or other judicial officer is a competent witness, particularly where the issue of probate may be tried before some one else.⁸⁶

When land was not chargeable with the debts of the owner, a creditor who was a witness to a will creating a charge upon the realty for the payment of a debt was disqualified to act as a witness. But modern statutes generally in terms prevent disqualification under such circumstances,⁸⁷ and with the change in the law relating to the liability of real property for the payment of debts it is likely that the same result would follow, even in the absence of express legislation.

A trustee is not beneficially interested under a will, so as to disqualify him from acting as a witness,⁸⁸ and the fact that the attorney who drew the will is an attesting witness does not affect the validity of its execution.⁸⁹ So a person who has signed the will for the testatrix may act as a witness.⁹⁰ And one need not be able to decipher all the words of a will to be a competent witness.⁹¹

M. (Miss.) 230; *Murphy v. Murphy*, 24 Mo. 526; *Comstock v. Ecclesiastical Soc.*, 8 Conn. 254, 20 Am. Dec. 100; *Coalter's Ex'r v. Bryan*, 1 Grat. (Va.) 18; *Millay v. Wiley*, 46 Me. 230; *Meyer v. Fogg*, 7 Fla. 292, 68 Am. Dec. 441; *In re Gagan*, 66 Hun, 632, 21 N. Y. Supp. 350; *In re Eysaman's Will*, 113 N. Y. 62, 20 N. E. 613, 3 L. R. A. 599; *Wyman v. Symmes*, 10 Allen (Mass.) 153; *Baker v. Bancroft*, 79 Ga. 672, 5 S. E. 46; *Children's Aid Soc. of City of New York v. Loveridge*, 70 N. Y. 387; *Geraghty v. Kilroy*, 103 Minn. 286, 114 N. W. 838.

⁸⁵ *Cochran v. Brown*, 76 N. H. 9, 78 Atl. 1072; *In re Lyon's Will*, 96 Wis. 339, 71 N. W. 362, 65 Am. St. Rep. 52. Contra: *Hule v. McConnell*, 47 N. C. 455; *Fearn v. Postlethwaite*, 240 Ill. 626, 88 N. E. 1057.

⁸⁶ *McLean v. Barnard*, 1 Root (Conn.) 462; *Patten v. Tallman*, 27 Me. 17.

⁸⁷ 25 Geo. II, c. 6, § 2; 1 Vict. c. 26, § 16.

This legislation has generally been followed in the United States.

⁸⁸ *Key v. Weathersbee*, 43 S. C. 414, 21 S. E. 324, 49 Am. St. Rep. 846.

⁸⁹ *Schieffelin v. Schieffelin*, 127 Ala. 14, 28 South. 687.

The fact that communications between attorney and client are ordinarily privileged does not prevent the attorney who attested from testifying concerning all pertinent facts. *O'Brien v. Spalding*, 102 Ga. 490, 31 S. E. 100, 66 Am. St. Rep. 202.

⁹⁰ *Ex parte Leonard*, 39 S. C. 518, 18 S. E. 216, 22 L. R. A. 302.

⁹¹ *Succession of Stewart*, 51 La. Ann. 1553, 26 South. 460.

SIGNING BY WITNESSES

73. Attestation is evidenced by the signatures of the witnesses.
74. Any completed mark or design made by the witness upon the material on which the will is written, with the intention that it shall, as a symbol, stand for or represent the maker in the capacity of an attesting witness, as the written name would do, is a sufficient signing.

The required number of witnesses must subscribe the will. The requirements of the statute are not satisfied by one witness subscribing it and the others being present;⁹² and a person present at the execution, but not subscribing the will, is not a competent witness to prove it.⁹³ It must be manifest also that the signature was intended as that of a witness. Thus where a will was signed, "G. W., per H. M. Witness: T. M.," it was held that H. M. was but an amanuensis for the testator, and that there was but one witness to the will.⁹⁴

When the witness signs for himself, the same principles control regarding the character of his signature, as in the case of signature by the testator.⁹⁵ A name, or a mark intended to represent the name, is enough.⁹⁶ And a mistake in the name written about the mark does not invalidate the attestation.⁹⁷ So a signature by initials is sufficient,⁹⁸ or by an assumed name,⁹⁹ though it has been held that where the witness inadvertently wrote the surname of the testator instead of his own there was not a sufficient attesta-

⁹² *McCarn v. Rundall*, 111 Iowa, 406, 82 N. W. 924; *Brengle v. Tucker*, 114 Md. 597, 80 Atl. 224.

⁹³ *International Trust Co. v. Anthony*, 45 Colo. 474, 101 Pac. 781, 22 L. R. A. (N. S.) 1002, 16 Ann. Cas. 1087; *Sloan v. Sloan*, 184 Ill. 579, 56 N. E. 952.

⁹⁴ *Burton v. Brown* (Miss.) 25 South. 61.

⁹⁵ See ante, p. 182.

⁹⁶ *Hindmarsh v. Charlton*, 8 H. L. C. 160; *Pridgen v. Pridgen's Heirs*, 85 N. C. 259; *Gillis v. Gillis*, 96 Ga. 1, 23 S. E. 107, 30 L. R. A. 143, 51 Am. St. Rep. 121 (under a statute providing for signing by mark—Civ. Code Ga. 1882, § 2415); *Garrett v. Heflin*, 98 Ala. 615, 13 South. 326, 39 Am. St. Rep. 89; *Davis v. Semmes*, 51 Ark. 48, 9 S. W. 434 (under a statute providing for signature by mark); *Appeal of Reaver*, 96 Md. 735, 54 Atl. 875, 94 Am. St. Rep. 610.

⁹⁷ *Goods of Ashmore*, 3 Curt. 756.

⁹⁸ *Goods of Christian*, 2 Robert. 110; *Jackson v. Van Dusen*, 5 Johns. (N. Y.) 144, 4 Am. Dec. 330.

⁹⁹ *In re Olliver*, 2 Spinks, 57.

tion.¹ The writing made must be intended by the witness to operate as a completed signature; otherwise there is no attestation. Thus where a witness started to write his name, and after writing "Sam'l" desisted because, through weakness, he found that he could not complete his signature legibly, probate was refused because the witness did not put the word upon the paper with the intention at the time that it should be a perfect signature.² So where a witness, having signed his name under circumstances such as to render the signature inoperative, afterwards completed an imperfect letter in the name, under circumstances which would have rendered the attestation valid had a signature then been made, the completion of the letter was held not to amount to a signature by reason of lack of intent that it should operate as such.³ But where a witness intentionally signed himself, "Servant to Mr. Sperling," understanding from the solicitor that this was the required form, the attestation was held sufficient.⁴

While another may sign for the testator, in his presence and at his request, by virtue of the usual statutory provision, there is considerable authority for the view that one may not thus sign for an attesting witness under any circumstances,⁵ though it is a sufficient signing if the witness's hand is guided by another,⁶ or if he

¹ In re Walker's Estate, 110 Cal. 387, 42 Pac. 815, 30 L. R. A. 460, 52 Am. St. Rep. 104.

Three judges dissented in the California case, and in a recent New York case, Jacobs' Will, 73 Misc. Rep. 162, 132 N. Y. Supp. 481, where witness inadvertently signed the name of testator, instead of his own, *animo attestandi*, the court admitted the will to probate. Under the statute of frauds, requiring an attestation and subscription by three or four witnesses, it is well settled that any writing *animo attestandi* is sufficient. *Harrison v. Harrison*, 8 Ves. 185. There seems to be no sufficient reason why the same construction should not be made in connection with modern will statutes.

² *Goods of Maddock*, L. R. 3 P. & D. 169. There was other evidence tending to show that the word written was not regarded as a signature. Had the writer, finding that he could not well complete his name, concluded that the word, as written, should be his signature, the result might have been different.

³ *Hindmarsh v. Carlton*, 8 H. L. C. 160.

So it may be shown that a signature in the usual place for that of a witness was not intended for attestation of the will, but to attest the signature of another witness, who signed by mark. *Boone v. Lewis*, 103 N. C. 40, 9 S. E. 644, 14 Am. St. Rep. 783.

⁴ *Goods of Sperling*, 3 Sw. & Tr. 272.

⁵ *Goods of White*, 2 Notes of Cas. 461; 1 Wms. Ex'rs, *127; *Riley v. Riley*, 36 Ala. 496; *Horton v. Johnson*, 18 Ga. 396; *McFarland v. Bush*, 94 Tenn. 538, 29 S. W. 899, 27 L. R. A. 662, 45 Am. St. Rep. 760.

⁶ *Harrison v. Elvin*, 3 Q. B. 117; *Goods of Frith*, 1 Sw. & Tr. 153; *Lewis v. Lewis*, 2 Sw. & Tr. 153; *Campbell v. Logan*, 2 Brad. Sur. (N. Y.) 90.

Contra: *Dawkins v. Dawkins*, 179 Ala. 666, 60 South. 289 (where one of the witnesses also signed for testatrix).

merely holds the top of the pen while another writes his name for him.⁷ But while a signature thus made may well require explanation and careful scrutiny, yet on principle and by weight of American authority, a signature made in behalf of a witness, at his request, and in the presence both of the witness and the testator, is sufficient,⁸ even though it be made by another witness.⁹

Place of Signature

In the absence of a statute to the contrary, the attestation need not be in any particular place, provided that there is evidence that the witnesses, in signing their names, had the intention of attesting.¹⁰ Thus where the signatures of the attesting witnesses appeared in the margin of the will, opposite certain alterations and interlineations only, and it was in evidence that when the witnesses thus wrote their names they intended to attest the testator's signature, the attestation was sufficient.¹¹ So, also, an attestation of a codicil upon the back of the will to which the paper containing the codicil was attached, is valid.¹² A signing by the witnesses in the attestation clause,¹³ or above it, is sufficient;¹⁴ but the position of

⁷ *Montgomery v. Perkins*, 59 Ky. (2 Metc.) 448, 74 Am. Dec. 419; *Lewis v. Lewis*, 2 Sw. & Tr. 153, 7 Jur. (N. S.) 688; *POPE'S WILL*, 139 N. C. 484, 52 S. E. 235, 7 L. R. A. (N. S.) 1193, 111 Am. St. Rep. 813, 4 Ann. Cas. 635, *Dunmore Cas. Wills*, 126 (even though witness was able at the time to write her own name).

⁸ *Schnee v. Schnee*, 61 Kan. 643, 60 Pac. 738; *In re Crawford's Will*, 46 S. C. 299, 24 S. E. 69, 32 L. R. A. 77, 57 Am. St. Rep. 701; *Upchurch v. Upchurch*, 16 B. Mon. (Ky.) 102; *Lord v. Lord*, 58 N. H. 7, 42 Am. Rep. 565; *Mock v. Garson*, 84 App. Div. 65, 82 N. Y. Supp. 310; *In re Strong's Will* (Sur.) 16 N. Y. Supp. 104; *Jesse v. Parker*, 47 Va. (6 Grat.) 57, 52 Am. Dec. 102.

⁹ *In re Strong* (Sur.) 16 N. Y. Supp. 104 (the New York cases are conflicting on this point). See *In re Losee's Will*, 13 Misc. Rep. 298, 34 N. Y. Supp. 1120; *Lord v. Lord*, 58 N. H. 7, 42 Am. Rep. 565; *Jesse v. Parker*, 47 Va. (6 Grat.) 57, 52 Am. Dec. 102 (in this case the will was sustained, although the body of the will, the signatures of the testator and of the three subscribing witnesses were all written by one person).

Contra: *Riley v. Riley*, 36 Ala. 496.

¹⁰ *Goods of Braddock*, 1 P. D. 433; *Kolowski v. Fausz*, 103 Ill. App. 528.

Although the statute of frauds required that the testator "sign" and that the witnesses "subscribe," the English courts held a signature by the witness anywhere upon the instrument to be a sufficient subscription under that statute. *Roberts v. Phillips*, 4 El. & Bl. 450, 82 E. C. L. 450, 1 Jur. (N. S.) 444. A similar construction has usually been made of the word "subscribe" in modern will statutes. But in Kentucky the word "subscribe" has been construed as requiring a signing by witnesses at the foot or end of the will. *Soward v. Soward*, 1 Duv. (Ky.) 126.

¹¹ *Goods of Streatley* (1891) Prob. 172.

¹² *Goods of Braddock*, 1 P. D. 433.

¹³ *Franks v. Chapman*, 64 Tex. 159.

¹⁴ *Moale v. Cutting*, 59 Md. 510.

the signatures is always significant as bearing upon the question whether attestation of the will as such was intended.

In any event, the subscription by the witnesses must be on the same sheet as that of the testator, or on something physically connected with that sheet,¹⁵ though the method of attachment is apparently immaterial.¹⁶ Accordingly, there was no sufficient attestation, when a will was drawn in duplicate and inadvertently testator signed one copy and witnesses the other.¹⁷ Where, however, the will is written upon several sheets, the parts may be fastened after attestation, without affecting the validity of the will.¹⁸

By statute, the signatures of the witnesses are sometimes required to be at the end of the will. Here, as in all cases, the signatures should follow the dispositive portions of the will, or the attestation clause, if one is used, as it always should be. Signatures preceding a clause appointing an executor are not at the end of the will, as required by statute,¹⁹ as are not signatures at the foot of the first page of a two-sheet printed form, where there is matter on a subsequent page, referred to by the words, "Continued on next page," and followed by the testator's signature.²⁰ The intervention of a blank between the end of the will and the signatures of the witnesses is not apparently material, even though it consist of two pages of a printed blank,²¹ though signatures upon the envelope containing the will cannot be regarded as at the end thereof.²² The signatures are at the end when the attestation clause follows the testator's signature, and is written entirely across the page, separating his signature from those of the witnesses.²³

¹⁵ *In re Baldwin's Will* (1907) 146 N. C. 25, 59 S. E. 163, 125 Am. St. Rep. 466.

See, however, *Bolton v. Bolton* (1914) 107 Miss. 84, 64 South. 967, where a mere folding of sheet signed by witness with that signed by testator was held sufficient.

¹⁶ *Goods of Horsford*, L. R. 3 P. & D. 211 (attestation on a paper fastened to will by a string); *Goods of Braddock*, L. R. 1 P. D. 433 (where witnesses, in attesting a codicil, signed their names on a will to which codicil was attached by a pin).

¹⁷ *Goods of Hatton*, L. R. 6 P. D. 204.

¹⁸ *Jones v. Habersham*, 63 Ga. 146. And see *Ward v. Board*, 12 Okl. 267, 70 Pac. 378.

¹⁹ *In re Blair's Will*, 84 Hun, 581, 32 N. Y. Supp. 845.

²⁰ *In re Albert's Will*, 38 Misc. Rep. 61, 76 N. Y. Supp. 965.

²¹ *In re Singer*, 19 Misc. Rep. 679, 44 N. Y. Supp. 606.

²² *Vogel v. Lehritter*, 139 N. Y. 223, 34 N. E. 914. These signatures, however, were clearly upon a paper which was no part of the will.

²³ *In re Beck's Will*, 6 App. Div. 211, 39 N. Y. Supp. 810.

Mutual Presence of Witnesses and Testator

Unless there is an express statutory requirement to that effect, the witnesses need not sign in one another's presence. A testator may sign in the presence of one witness, and acknowledge his signature to another, or he may acknowledge the signature to each separately.²⁴ Construing the Wills Act, 1 Vict. c. 26, § 9, the English courts have held that the witnesses must both be present when the testator signs, and that a signature in the presence of one, followed by an acknowledgment to another, is insufficient.²⁵

Under a statute requiring that the witnesses sign in the presence of each other, it is not essential that the witnesses actually see each other sign.²⁶

When Witnesses must Sign

The rule, supported by principle and the weight of authority, is that everything required to be done by the testator in the execution of a will shall precede in point of time the subscription by the attesting witnesses, and that if the signatures of the latter precede the signing by the testator there is no proper attestation, and the will is void;²⁷ for, until the testator has signed, there is no will and nothing to attest. There is, however, very respectable authority for the view that where the witnesses and the testator all sign in the presence of one another it is not essential that the testator sign first, if the signature and attestation be parts of the same transaction.²⁸ Courts taking the latter view regard the affix-

²⁴ *Hoffman v. Hoffman*, 26 Ala. 536; *Appeal of Lane*, 57 Conn. 182, 17 Atl. 926, 4 L. R. A. 45, 14 Am. St. Rep. 94; *Flinn v. Owen*, 58 Ill. 111; *In re Hull's Will*, 117 Iowa, 738, 89 N. W. 979; *Appeal of Deake*, 80 Me. 50, 12 Atl. 790; *Hogan v. Grosvenor*, 10 Metc. (Mass.) 54, 43 Am. Dec. 414; *In re Clark's Will* (N. J. Prerog.) 52 Atl. 222; *Willis v. Mott*, 36 N. Y. 486; *Blanchard's Heirs v. Blanchard's Heirs*, 32 Vt. 62.

²⁵ *Moore v. King*, 3 Curt. 243.

²⁶ *Blanchard's Heirs v. Blanchard's Heirs*, 32 Vt. 62; *IN RE CLAFLIN'S WILL*, 73 Vt. 129, 50 Atl. 815, 87 Am. St. Rep. 693, *Dunmore Cas. Wills*, 115.

²⁷ *Lane v. Lane*, 125 Ga. 386, 54 S. E. 90, 114 Am. St. Rep. 207, 5 Ann. Cas. 462; *Brooks v. Woodson*, 87 Ga. 379, 13 S. E. 712, 14 L. R. A. 160; *Reed v. Watson*, 27 Ind. 443; *Marshall v. Mason*, 176 Mass. 216, 57 N. E. 340, 79 Am. St. Rep. 305; *Chase v. Kittredge*, 11 Allen (Mass.) 49, 87 Am. Dec. 687; *Lacey v. Dobbs*, 63 N. J. Eq. 325, 50 Atl. 497, 55 L. R. A. 580, 92 Am. St. Rep. 667, reversing *Id.*, 61 N. J. Eq. 575, 47 Atl. 481; *In re Purdy's Will*, 25 Misc. Rep. 458, 55 N. Y. Supp. 644; *In re McMulkin*, 6 Dem. Sur. (N. Y.) 347; *Sisters of Charity of St. Vincent de Paul v. Kelly*, 67 N. Y. 409; *Goods of Olding*, 2 Curt. 865; *In re Irvine's Estate*, 206 Pa. 1, 55 Atl. 795; *Simmons v. Leonard*, 91 Tenn. 192, 18 S. W. 280, 30 Am. St. Rep. 865.

²⁸ *In re Silva's Estate* (1915) 169 Cal. 116, 145 Pac. 1015; *In re Shafter's Estate*, 35 Colo. 578, 85 Pac. 688, 6 L. R. A. (N. S.) 575, 117 Am. St. Rep. 216; *O'Brien v. Gallagher*, 25 Conn. 229; *Gibson v. Nelson*, 181 Ill. 122, 54 N. E. 901, 72 Am. St. Rep. 254; *Swift v. Wiley*, 1 B. Mon. (Ky.) 114; *Horn v. Bartow* (1910)

ing of signatures as constituting part of a single transaction and therefore say that there is no substantial priority.²⁹

In the absence of proof to the contrary, it will be presumed that the testator signed first.³⁰

ATTESTATION IN THE PRESENCE OF THE TESTATOR

75. It is generally required, by statute, that the witnesses shall attest the will in the presence of the testator. This requirement is met when the witnesses sign in such a location that the testator, assuming him to be conscious and aware of the fact that attestation is going on, could, without materially changing the general situation of his body, see the act of attestation, or, in case there is any obstacle intervening, could, of himself, remove such obstacle.

The purpose of this requirement is to guard against fraud being practiced upon the testator by the substitution of another document for that really containing his will, and to make the testator an active instrumentality to this end. Hence the testator must be conscious, i. e., there must be a mental as well as physical presence on his part;³¹ and, for the same reason, though conscious, he must actually know what is going on.³² Where the will is attested in a secret and clandestine manner, the attestation is invalid, though the testator be present in the same room.³³ But if, when able to do so, the testator fails to exercise his privilege of actually seeing

161 Mich. 20, 125 N. W. 696, 26 L. R. A. (N. S.) 1126, 20 Ann. Cas. 1364; *Cutler v. Cutler*, 130 N. C. 1, 40 S. E. 689, 57 L. R. A. 209, 89 Am. St. Rep. 854; *Kaufman v. Caughman*, 49 S. C. 159, 27 S. E. 16, 61 Am. St. Rep. 808.

²⁹ "In acts substantially contemporaneous, it cannot be said that there is any substantial priority." *Jones, J., in Kaufman v. Caughman*, 49 S. C. 159, 166, 27 S. E. 16, 61 Am. St. Rep. 808.

³⁰ *Flood v. Kerwin*, 113 Wis. 673, 89 N. W. 845; *Allen v. Griffin*, 69 Wis. 529, 35 N. W. 21; *Goods of Peverett* (1902) Prob. 205.

So the testimony of the scrivener and one of the witnesses of a will drawn in due form, though contradicted by the other witness, is sufficient to prove that the testator signed first. *In re Menge's Will*, 13 Misc. Rep. 553, 35 N. Y. Supp. 493.

³¹ *Right v. Price*, 1 Doug. 241; *Hill v. Barge*, 12 Ala. 687; *Etchison v. Etchison*, 53 Md. 348. *In re Meurer's Will*, 44 Wis. 392, 28 Am. Rep. 591.

"All the witnesses knew at the time of the attestation that the testator was insensible. He was a log, and totally absent, to all mental purposes. * * * Here the trunk remained, but the man was gone." *Right v. Price*, *supra*.

³² *Jenner v. Finch*, 49 L. J. P. 25, 5 P. D. 106.

³³ *Longford v. Eyre*, 1 P. Wms. 740; *WAITE v. FRISBIE*, 45 Minn. 361, 47 N. W. 1069, *Dunmore Cas. Wills*, 100.

the signing, this does not affect the validity of the execution.³⁴ For the requirement is made primarily for the benefit of the testator, and, although he cannot waive attestation in his presence, he may, if he chooses, refuse or neglect to look when the act is actually done in his presence.

A signature by a witness after the death of the testator is ineffectual, though made at the request of the latter, who died before it could be complied with.³⁵

Acknowledgment Insufficient

The signatures of the witnesses must be actually made in the presence of the testator. If not thus made, their subsequent acknowledgment³⁶ or retracing³⁷ is wholly ineffectual. To allow them to acknowledge in his presence would open a door to fraud and mistake. But statutes are sometimes so construed as to make such an acknowledgment valid.³⁸

Physical Presence of Testator

Provided that the witnesses are so situated that the testator can see them when they sign,³⁹ it is immaterial where the witnesses are. They may be in the same room or an adjoining room, or in a room connected with the room where the testator is; the only difference being that, when attestation takes place in the same room, there is a presumption that the testator saw or might have seen the act,⁴⁰ while there is no such presumption in the other case.⁴¹ It is not necessary that the testator and witnesses be even in the

³⁴ *Drury v. Connell*, 177 Ill. 43, 52 N. E. 368; *Allen's Will*, 25 Minn. 39; *Tod v. Winchelsea*, 2 Carr. & P. 488; *Walker v. Walker*, 67 Miss. 529, 7 South. 491; *Alkin v. Weckerly*, 19 Mich. 482; *Cherry's Will*, 164 N. C. 363, 79 S. E. 288; *SHIRES v. GLASCOCK*, 2 Salk. 688, *Dunmore Cas. Wills*, 135.

³⁵ *In re Fish's Will*, 88 Hun. 56, 34 N. Y. Supp. 536. See, also, *In re Nieman* (Tex. Sup.) 14 S. W. 25.

³⁶ *Calkins v. Calkins*, 216 Ill. 458, 75 N. E. 182, 1 L. R. A. (N. S.) 393, 108 Am. St. Rep. 233; *Mendell v. Dunbar*, 169 Mass. 74, 47 N. E. 402, 61 Am. St. Rep. 277; *Town of Pawtucket v. Ballou*, 15 R. I. 58, 23 Atl. 43, 2 Am. St. Rep. 868; *Moore v. King*, 3 Curt. 243; *Chase v. Kittredge*, 11 Allen, 49, 87 Am. Dec. 687; *In re Downie's Will*, 42 Wis. 66.

³⁷ *Goods of Maddock*, L. R. 3 P. & D. 169; *Horne v. Featherstone*, 73 Law T. 32.

³⁸ *In re Karrer's Will*, 63 Misc. Rep. 174, 118 N. Y. Supp. 427 (decided under New York statute which does not require a signing in the presence of testator); *In re Phillips' Will* (Sur.) 34 Misc. Rep. 442, 69 N. Y. Supp. 1011; *Herrick v. Snyder* (Sup.) 27 Misc. Rep. 462, 59 N. Y. Supp. 229. And see *Parramore v. Taylor*, 11 Grat. (Va.) 220.

³⁹ *SHIRES v. GLASCOCK*, 2 Salk. 688, *Dunmore Cas. Wills*, 135.

⁴⁰ *Stewart v. Stewart*, 56 N. J. Eq. 761, 40 Atl. 438; *Ayres v. Ayres*, 43 N. J. Eq. 565, 12 Atl. 621.

⁴¹ *Lamb v. Girtman*, 26 Ga. 625; *Watson v. Pipes*, 32 Miss. 451.

same house at the time of attestation. Thus, where the testatrix signed her will while sitting in her carriage, outside her attorney's office, and the witnesses signed it inside the office, but within range of the testatrix's vision from where she sat, the attestation was treated as sufficient.⁴² And where there was a broken window in the room to which the witnesses had retired, through which the testator might have seen the attestation, it was held sufficient.⁴³

While there is much apparent and some actual conflict as to what constitutes the physical presence of the testator for purposes of attestation, yet there is no question but that there is sufficient presence if the rule as stated in the black-letter text is complied with; and it is believed that, by weight of authority, the test therein stated must be met, to render the attestation valid.⁴⁴ Thus, where the curtains were drawn at the foot of the bed to screen the testator from the fire, and one of the witnesses signed the will on a table standing between the bed and the fire, the attestation was held valid.⁴⁵ But, where, after the testator had signed the will, the witnesses retired to an adjoining room, where they subscribed upon a table so situated that the testator could not have seen them, there was no attestation in his presence.⁴⁶ But where, by sitting up in

⁴² *Casson v. Dade*, 1 Bro. O. C. 99.

⁴³ *SHIRES v. GLASCOCK*, 2 Salk. 688, *Dunmore Cas. Wills*, 135.

⁴⁴ Many decisions on this point are collected in note to *Mandeville v. Parker* published in 31 N. J. Eq. 242, and in note to *Healey v. Bartlett*, 73 N. H. 110, 59 Atl. 617, published in 6 Ann. Cas. 413.

⁴⁵ *NEWTON v. CLARKE*, 2 Curt. 320. Here the testator could have removed the obstacle.

So where a will was signed by a witness in a room joining that where the testatrix was lying in bed, but at a table directly in front of the door, so that the testatrix might have seen the witness sign, had she looked, the attestation was in the presence of the testatrix. *HOPKINS v. WHEELER*, 21 R. I. 533, 45 Atl. 551, 79 Am. St. Rep. 819, *Dunmore Cas. Wills*, 70.

See, also, *Campbell v. McGuiggan* (N. J. Prerog.) 34 Atl. 383 (where the table was about four feet from the bed on which the testatrix lay); *Walker v. Walker*, 67 Miss. 529, 7 South. 491 (where the testator, by turning his head, could have seen the act of attestation).

⁴⁶ *Goods of Colman*, 3 Curt. 118. Accord: *Carter v. Seaton*, 85 Law T. 76.

So, also, where the testator lay in bed, with his back to the witnesses, unable to see them sign or to turn himself over, the attestation was invalid. *Neill v. Neill*, 1 Leigh (Va.) 6. The same case holds that it would not have been enough, could he have been moved by others, had he so desired. Contra, in this respect, *Orndorff v. Hummer*, 12 B. Mon. (Ky.) 619. Accord: *Tribe v. Tribe*, 1 Robert. 775. See, also, *Mendell v. Dunbar*, 169 Mass. 74, 47 N. E. 402, 61 Am. St. Rep. 277 (where no part of the room to which the witnesses withdrew was visible from the room where the testator was); *Witt v. Gardner*, 158 Ill. 176, 41 N. E. 781, 49 Am. St. Rep. 150 (where the testatrix could not, without danger to her life, have changed her position so as to see the at-

bed, as he was able to do, the testator might have seen the attestation, it was valid.⁴⁷

Where a testator drew a will in his private office, and it was attested in an adjoining room at a desk which was not in the line of vision of the table at which the testator sat during the attestation, the latter was invalid, though the testator knew that the act was going on, and the connecting door was open all the while.⁴⁸

Contrary Rule

But while the last case and others cited represent the prevailing rule, there are certain American cases which go to the length of holding that it is immaterial whether the testator could actually have seen the attestation, in the place where he was, or not, provided that he was able to move to a place where he might have seen, and he afterwards examined the signatures of the witnesses and expressed himself as satisfied.⁴⁹ And it has been held that an attestation signed by witnesses within four feet of a testator obliged, by reason of an accident to lie upon his back, and unable to turn his head so that he might see the witnesses sign, was sufficient, where the instrument was handed to the testator immediately after the attestation, and he read the names as signed,⁵⁰ and a will has been held to have been properly executed under similar circumstances even when attested in another room across the hall from where testator lay.⁵¹

testation); *Goods of Ellis*, 2 Curt. 395; *Doe dem. Wright v. Manifold*, 1 M. & S. 294; *Jones v. Tuck*, 48 N. C. 202; *Schofield v. Thomas*, 236 Ill. 417, 88 N. E. 122.

⁴⁷ *Goods of Trimmell*, 11 Jur. (N. S.) 248. Accord: *Raymond v. Wagner*, 178 Mass. 315, 59 N. E. 811.

⁴⁸ *Norton v. Bazett*, Deane, 259.

⁴⁹ *Cunningham v. Cunningham*, 80 Minn. 180, 83 N. W. 58, 51 L. R. A. 642, 81 Am. St. Rep. 256. This case is squarely in conflict with *Norton v. Bazett*, Deane, 259. In principle, it seems sound, however. If the failure of a testator, sick in bed, to turn his head and see the attestation, does not affect the validity of a will, the failure of an able-bodied testator to take the few steps necessary to bring him in sight of the witnesses ought not to have this effect. He is constructively in the presence of the witnesses in both cases. See, also, *Smith v. Holden*, 58 Kan. 535, 50 Pac. 447.

⁵⁰ *RIGGS v. RIGGS*, 135 Mass. 238, 46 Am. Rep. 464, *Dunmore Cas. Wills*, 136; *Cook v. Winchester*, 81 Mich. 581, 46 N. W. 106, 8 L. R. A. 822; *Sturdivant v. Birchett*, 10 Grat. (Va.) 67.

These cases are, in principle, sound, though they are against the current of authority as to what constitutes presence of the testator. The cases are likened to those involving the wills of blind testators, and the analogy is certainly complete.

⁵¹ *Healey v. Bartlett*, 73 N. H. 110, 59 Atl. 617, 6 Ann. Cas. 413 (where testator unable to change his position because of a broken leg).

Ability to See What

The requirement that witnesses subscribe in the presence of testator has been construed as meaning that the witnesses must sign where the testator can see the document to enable him to see, if he chooses, that the paper signed by them is identical with that signed by him, and a signing where testator was able to see only the backs of the witnesses has, therefore, been held insufficient.⁵² However, when a testator, conscious that witnesses are subscribing their names, is in the room where his will is attested and is physically able to move, it is difficult to see why attestation is not in his presence merely because he cannot see the document at the time it is being subscribed.⁵³

Blind Testators

There is considerable authority for the view that the same rules regarding attestation in the presence of testators apply to blind testators as to others;⁵⁴ i. e., the attestation must be such as would have been valid if the testator could have seen. It is said, however, by way of dicta, that, if the subscription be made where a blind testator may take cognizance of the act by his other senses, that is enough.⁵⁵ It is evident, however, that he has no means of taking cognizance of the act of attestation, for the purpose for which cognizance is required; and the serious argument of the cases⁵⁶ to show that a man may be in the presence of a blind man is hardly in point. Viewed in the light of why presence is required, it is clear that witnesses cannot be in the presence of a blind man for purposes of attesting a will. Yet, it being settled that a blind testator may make a will, there seems no intrinsic reason why, in regard to attestation, he should be put upon a better footing than other testators.

⁵² In re Snow's Will, 128 N. C. 100, 38 S. E. 293; Burney v. Allen, 125 N. C. 314, 34 S. E. 500, 74 Am. St. Rep. 637; Graham v. Graham, 82 N. C. 219.

He need not, however, be able to see the letters as they are formed. Ayres v. Ayres, 43 N. J. Eq. 565, 12 Atl. 621.

⁵³ It is submitted that the decision in Bynum v. Bynum, 33 N. C. 632, holding a will sufficient when attested under the circumstances suggested, is preferable to that of other decisions from that jurisdiction cited in preceding note.

See, also, In re Tobin, 196 Ill. 484, 63 N. E. 1021; Nock v. Nock, 10 Grat. (Va.) 106.

⁵⁴ Goods of Piercy, 1 Robert. 278; In re Arneson's Will, 128 Wis. 112, 107 N. W. 21.

⁵⁵ Ray v. Hill, 3 Strob. (S. C.) 297, 49 Am. Dec. 647; RIGGS v. RIGGS, 135 Mass. 238, 46 Am. Rep. 464, Dunmore Cas. Wills, 136; Schoul. Wills, § 343.

⁵⁶ See RIGGS v. RIGGS, 135 Mass. 238, 46 Am. Rep. 464, Dunmore Cas. Wills, 136.

Attestation Clause

The validity of a will is not affected by the fact that the attestation clause does not state the facts necessary to a proper execution of the will,⁵⁷ or by the entire absence of an attestation clause.⁵⁸

Residence of Witnesses

Although generally there is no requirement that a witness append to his signature a statement as to his residence,⁵⁹ in several jurisdictions the witnesses are required by statute to write their addresses opposite their signatures. It is usually provided that a failure to write address shall not invalidate will, but shall subject witness to the payment of a penalty.⁶⁰

EVIDENCE OF EXECUTION

76. The burden of proving the due execution of a will is upon the proponent. This proof is effected, if possible, through the attesting witnesses, whose attestation is largely for this purpose.

Due execution is required by statute. The proponent must prove that all statutory requirements are met. Hence the unquestioned rule of the black-letter text.⁶¹ The question as to what formalities

⁵⁷ *Schofield v. Thomas*, 236 Ill. 417, 86 N. E. 122; *Barricklow v. Stewart*, 163 Ind. 438, 72 N. E. 128; *In re Cornell's Will*, 89 App. Div. 412, 85 N. Y. Supp. 920.

⁵⁸ *Williams v. Miles* (1903) 68 Neb. 463, 94 N. W. 705, 96 N. W. 151, 62 L. R. A. 383, 110 Am. St. Rep. 431, 4 Ann. Cas. 306; *In re Akers' Will* (1903) 173 N. Y. 620, 66 N. E. 1103; *Robinson v. Brewster*, 140 Ill. 649, 30 N. E. 683, 33 Am. St. Rep. 265; *Olerick v. Ross*, 146 Ind. 282, 45 N. E. 192; *In re Hull's Will*, 117 Iowa, 738, 89 N. W. 979; *Berberet v. Berberet*, 131 Mo. 399, 33 S. W. 61, 52 Am. St. Rep. 634; *Allaire v. Allaire*, 37 N. J. Law, 312; *In re Crane's Will*, 68 App. Div. 355, 74 N. Y. Supp. 88; *Ward v. Board* 12 Okl. 267, 70 Pac. 378. For significance of attestation clause, see post, p. 220.

⁵⁹ *In re Sandmann's Will* (N. J. Prerog. 1908) 68 Atl. 754.

⁶⁰ See *Dodge v. Findlay*, 40 App. Div. 18, 57 N. Y. Supp. 791, quoting New York statute.

⁶¹ *Barnewall v. Murrell*, 108 Ala. 366, 18 South. 831; *Craig v. Southard*, 162 Ill. 209, 44 N. E. 393; *Egbers v. Egbers*, 177 Ill. 82, 52 N. E. 285; *Morell v. Morell*, 157 Ind. 179, 60 N. E. 1092; *In re Hull's Will*, 117 Iowa, 738, 89 N. W. 979; *Goldthorp v. Goldthorp*, 115 Iowa, 430, 88 N. W. 944; *Barlow v. Waters* (Ky.) 28 S. W. 785; *McFadin v. Catron*, 120 Mo. 252, 25 S. W. 506; *Gordon v. Burris*, 141 Mo. 602, 43 S. W. 642; *Murry v. Hennessey*, 48 Neb. 608, 67 N. W. 470; *Seebrook v. Fedawa*, 30 Neb. 424, 46 N. W. 650; *In re Hitchler's Will*, 25 Misc. Rep. 365, 55 N. Y. Supp. 642; *Luper v. Werts*, 19 Or. 122, 23 Pac. 850; *In re Simcox's Estate*, 11 Pa. Co. Ct. R. 545; *Kennedy v. Upshaw*, 66 Tex. 442, 1 S. W. 308. Contra: *In re Latour*, 140 Cal. 414, 73 Pac. 1070, 74 Pac. 441 (because California Code places burden on contestant on all the issues).

are essential to the execution of the will is one of law.⁶² The question whether these formalities have been actually complied with is one of fact.⁶³ The amount of proof of proper execution in conformity to the particulars required by statute need only be such as is reasonably sufficient to satisfy the jury,⁶⁴ and an instruction that if there is a doubt left in the minds of the jurors as to any one or all of these particulars they must find against the will, is wrong, as requiring too high a degree of proof.⁶⁵

The burden of proof as to due execution does not shift to contestant merely because proponent has introduced evidence sufficient to make out a *prima facie* case.⁶⁶

It is sometimes said that the burden of proof may be increased by circumstances, as where the will of a testator who could write was signed by a mark, and was witnessed by relatives of a beneficiary, who induced the testator to make the will;⁶⁷ but probably this is to be understood as meaning that the amount of evidence required to be produced by the proponents under such circumstances is greater than would be required under others.

While the general rule is that the proponent of a will must examine the attesting witnesses, who are placed about the testator to ascertain and judge of his capacity, and to see that no fraud is practiced upon him in its execution,⁶⁸ yet he is not confined to, nor bound by, evidence from this source,⁶⁹ but the will is entitled to

⁶² *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113; *In re Grossman's Estate*, 75 Ill. App. 224.

⁶³ *In re Laudy's Will*, 161 N. Y. 429, 55 N. E. 914; *In re Hull's Will*, 117 Iowa, 738, 89 N. W. 979.

⁶⁴ *Snider v. Burks*, 84 Ala. 53, 4 South. 225.

⁶⁵ *Brown v. Walker* (Miss.) 11 South. 724.

⁶⁶ *Goodfellow v. Shannon*, 197 Mo. 271, 94 S. W. 979.

⁶⁷ *Donnelly v. Broughton* (1891) App. Cas. 435.

⁶⁸ *Apperson v. Cottrell*, 3 Port. (Ala.) 51, 29 Am. Dec. 239; *Field's Appeal*, 36 Conn. 278; *Rash v. Purnel*, 2 Har. (Del.) 448; *McKeen v. Frost*, 46 Me. 239; *Brown v. Wood*, 17 Mass. 72; *Brock v. Lockett's Ex'rs*, 4 How. (Miss.) 482; *Bailey v. Stiles*, 2 N. J. Eq. 231; *Fetherly v. Waggoner*, 11 Wend. (N. Y.) 599; *Jones v. Arterburn*, 11 Humph. (Tenn.) 97; *Nalle's Representatives v. Fenwick*, 4 Rand. (Va.) 585; *Lord Carrington v. Payne*, 5 Ves. 404 (Perkins' Ed.) and cases in note A.

Secondary evidence with regard to execution of the will by the testator cannot be received when the memory of two of the witnesses to the will has wholly failed as to the facts attending the execution, and the nonproduction of the third witness is not accounted for. *Elwell v. Convention*, 76 Tex. 514, 13 S. W. 552.

⁶⁹ *In re Buckley's Will* (Sur.) 2 N. Y. Supp. 24; *Hobart v. Hobart*, 154 Ill. 610, 39 N. E. 581, 45 Am. St. Rep. 151; *Webster v. Yorty*, 194 Ill. 408, 62 N. E. 907; *Gillis v. Gillis*, 96 Ga. 1, 23 S. E. 107, 30 L. R. A. 143, 51 Am. St. Rep. 121; *Hopf v. State*, 72 Tex. 281, 10 S. W. 589; *Stephenson v. Stephenson*, 6

probate where the attestation clause and all the surrounding circumstances show due execution, though in direct opposition to the testimony of both subscribing witnesses.⁷⁰ And it is not necessary that each witness should be able to testify that all the formalities required for the attestation of the will were complied with.⁷¹

It is frequently provided by statute, and is sometimes established by usage, that the execution of the will may be proved by calling one only of the attesting witnesses, particularly when there is no contest over the probate.⁷² And the positive testimony of one witness as to the facts of the execution is ordinarily sufficient to make out a *prima facie* case for the proponent, though the memory of the other witnesses has entirely failed.⁷³

It is sometimes required by statute, however, that, on the application for probate, two, at least, of the subscribing witnesses shall be produced, if they are accessible.⁷⁴ This requirement is regarded as met if the witnesses are present and examined when the will is propounded, though the proponent himself may not have called them both as witnesses.⁷⁵ Neither does such a statute require that each or any of the witnesses to the will must testify that the requirements of the statute respecting execution have been complied with.⁷⁶

Where no witnesses are required to a will, it is sufficiently proved by the testimony of two witnesses that the entire paper is in the handwriting of the testator.⁷⁷

Tex. Civ. App. 529, 25 S. W. 649, distinguishing *Elwell v. Convention*, 76 Tex. 521, 13 S. W. 552.

Proponent may introduce evidence of previous statements, made by attesting witness out of court, which are at variance with his testimony when will is offered for probate, *Thompson v. Owen*, 174 Ill. 229, 51 N. E. 1046, 45 L. R. A. 682, or he may impeach such witness in any other manner. *Wigmore on Ev.* § 917.

⁷⁰ *In re Cottrell*, 95 N. Y. 329; *In re Van Houten's Will*, 15 Misc. Rep. 196, 37 N. Y. Supp. 39; *Lowe v. Jolliffe*, 1 Wm. Bl. 365; *Dayman v. Dayman*, 71 Law T. 699.

⁷¹ *Newhouse v. Godwin*, 17 Barb. (N. Y.) 236; *Jauncey v. Thorne*, 2 Barb. Ch. (N. Y.) 40, 45 Am. Dec. 424; *Weir v. Fitzgerald*, 2 Bradf. Sur. (N. Y.) 42.

⁷² 1 Wms. Ex'rs, 394; *Ffield's Appeal*, 36 Conn. 277; *Dan v. Brown*, 4 Cow. (N. Y.) 483, 15 Am. Dec. 395; *Upton v. Bernstein*, 76 Hun, 516, 27 N. Y. Supp. 1078; *McKeen v. Frost*, 46 Me. 247; *Farley v. Farley*, 50 N. J. Eq. 434, 26 Atl. 178; *Jones v. Roberts*, 96 Wis. 427, 70 N. W. 685, 71 N. W. 883; *Morton v. Heldorn*, 135 Mo. 608, 37 S. W. 504.

⁷³ *In re Buchan's Will*, 16 Misc. Rep. 204, 39 N. Y. Supp. 1124; *In re De Haas*, 19 App. Div. 266, 46 N. Y. Supp. 189.

⁷⁴ *Code Civ. Proc. N. Y.* § 2611.

⁷⁵ *In re Stewart's Will*, 59 Hun, 618, 13 N. Y. Supp. 219.

⁷⁶ *In re Graham*, 56 Hun, 640, 9 N. Y. Supp. 122.

⁷⁷ *Franklin v. Franklin*, 90 Tenn. 44, 16 S. W. 557 (under a statute dispens-

Where both witnesses have testified to the due execution of a will before the register, its execution cannot be subsequently disproved by the unsupported testimony of one of the witnesses, contradicting that given by him before the register.⁷⁸

THE SIGNIFICANCE OF THE ATTESTATION CLAUSE

77. When the signatures of the witnesses are accompanied by an attestation clause setting forth compliance with the statutory requirements regarding execution, such clause is, on proof of the signatures of testator and subscribing witnesses, *prima facie* evidence of the facts stated therein.

While it is true that proof of the signatures of the witnesses *animo attestandi* is generally deemed sufficient to raise a presumption that the statutory requirements have been complied with,⁷⁹ yet this presumption will not be so strong as that afforded by a clear attestation clause, reciting the performance of all the necessary acts.⁸⁰

The value of the attestation clause is particularly apparent when the attesting witnesses fail to recollect the circumstances attending the execution. It is the law that when, from the lapse of time, the witnesses cannot recall these facts, the existence of this clause, correctly reciting the various acts as they should have been done, will be accepted as evidence of a valid execution;⁸¹ and this is true

ing with witnesses to wills of personalty when such will is in the handwriting of the testator).

⁷⁸ In re Rice's Estate, 173 Pa. 298, 33 Atl. 1100.

⁷⁹ Big. Wills, 58; 1 Jar. Wills, 123. See, also, Woodruff v. Hundley, 127 Ala. 640, 29 South. 98, 85 Am. St. Rep. 145; More v. More, 211 Ill. 268, 71 N. E. 988; In re Johnson, 2 Curt. 341; Moale v. Cutting, 59 Md. 510; Ela v. Edwards, 16 Gray (Mass.) 91; In re Phillips, 98 N. Y. 267; Robinson v. Brewster, 140 Ill. 649, 30 N. E. 683, 33 Am. St. Rep. 265; Goods of Thomas, 1 Sw. & Tr. 255; Goods of Malins (1887) 19 Ir. Ch. Div. 231. In a few cases the courts have refused to presume that will was executed in conformity with statutory requirements upon proof that witnesses signed *animo attestandi*. In re Tyler's Estate, 121 Cal. 405, 53 Pac. 928; Swain v. Edmunds, 53 N. J. Eq. 142, 32 Atl. 369.

⁸⁰ Big. Wills, 58; Elkinton v. Brick, 44 N. J. Eq. 154, 15 Atl. 391, 1 L. R. A. 161; Woolley v. Woolley, 95 N. Y. 231; In re O'Hagan's Will, 73 Wis. 78, 40 N. W. 649, 9 Am. St. Rep. 763.

Where, however, it appears that the attestation clause was not read over to the attesting witnesses, nor read by them, its recitals are without weight. In re Hitchler's Will, 25 Misc. Rep. 365, 55 N. Y. Supp. 642.

⁸¹ Will of Harkins (Sur. Ct. N. Y.) Chaplin, Wills, 283; Will of Morrison, Id. 282; In re Tyler's Estate, 121 Cal. 405, 53 Pac. 928; Underwood v. Thurman, 111 Ga. 325, 36 S. E. 788; Gould v. Seminary, 189 Ill. 282,

though the final result of the witnesses' recollection is rather hostile to due execution than otherwise.⁸² A similar rule prevails when there is conflict in the testimony of the witnesses, as to whether there was sufficient execution,⁸³ and circumstances may be such that the will may be admitted to probate even though all the witnesses deny that there was a valid execution.⁸⁴ Such denials are naturally viewed with suspicion, in view of the prior solemn attestation.⁸⁵ Still, the attestation clause is by no means conclusive of what it recites, and execution may be disproved in spite of it. "Execution cannot be presumed in opposition to positive testimony, merely upon the ground that the attestation clause is in due form, and states that all things were done which are required to be done to make the instrument valid as a will."⁸⁶

It is sometimes provided by statute that if the subscribing witnesses have forgotten the circumstances, and testify against the execution of the will, it may nevertheless be established on proof of the handwriting of the testator and of the subscribing witnesses, and of such other circumstances as would tend to prove due execution.⁸⁷

59 N. E. 536; *Hennes v. Huston*, 81 Minn. 30, 83 N. W. 439; *Craig v. Craig*, 156 Mo. 358, 56 S. W. 1097; *In re Alpaugh's Will*, 23 N. J. Eq. 507; *Miller v. Van Dyk* (N. J. Prerog.) 9 Atl. 372; *In re Hunt's Will*, 110 N. Y. 278, 18 N. E. 106; *In re Carey's Will*, 24 App. Div. 531, 49 N. Y. Supp. 32; *In re Sears' Estate*, 33 Misc. Rep. 141, 68 N. Y. Supp. 363; *In re Brissell's Will*, 16 App. Div. 137, 45 N. Y. Supp. 122; *In re Johnson's Will*, 7 Misc. Rep. 220, 27 N. Y. Supp. 649; *In re Laudy's Will*, 78 Hun. 479, 29 N. Y. Supp. 136; *In re Schweigert's Estate*, 17 Misc. Rep. 186, 40 N. Y. Supp. 979; *In re Buel's Will*, 44 App. Div. 4, 60 N. Y. Supp. 385; *In re Sanderson*, 9 Misc. Rep. 574, 30 N. Y. Supp. 848; *Skinner v. Lewis*, 40 Or. 571, 62 Pac. 523, 67 Pac. 951; *Gable v. Rauch*, 50 S. C. 95, 27 S. E. 555; *In re Claffin's Will*, 73 Vt. 129, 50 Atl. 815, 87 Am. St. Rep. 693; *Goods of Holgate*, 1 Sw. & Tr. 261.

⁸² *Will of Harkins* (Sur. Ct. N. Y.) *Chaplin, Wills*, 283; *In re O'Hagan's Will*, 73 Wis. 78, 40 N. W. 649, 9 Am. St. Rep. 763.

⁸³ *Farley v. Farley*, 50 N. J. Eq. 434, 26 Atl. 178; *McCurdy v. Neall*, 42 N. J. Eq. 333, 7 Atl. 566; *In re Bernsee's Will*, 141 N. Y. 389, 36 N. E. 314; *In re Bedell*, 2 Con. Sur. 328, 12 N. Y. Supp. 96; *In re Stillman*, 2 Con. Sur. 207, 9 N. Y. Supp. 446.

⁸⁴ See ante, p. 219.

⁸⁵ See *Matter of Cottrell*, 95 N. Y. 329; *Orser v. Orser*, 24 N. Y. 51.

⁸⁶ *Allen, J.*, in *Lewis v. Lewis*, 11 N. Y. 220. See, also, *Bogert v. Batemen*, 65 Atl. (N. J. Prerog.) 238; *Berdan's Case*, 65 N. J. Eq. 681, 55 Atl. 728; *Orser v. Orser*, 24 N. Y. 51; *Tarrant v. Ware*, 25 N. Y. 425, note; *Kelthley v. Stafford*, 126 Ill. 507, 18 N. E. 740; *In re Meurer's Will*, 44 Wis. 392, 28 Am. Rep. 591; *Glover v. Smith*, 57 L. T. 60; *In re Sarauw's Will* (Sur.) 2 N. Y. Supp. 629.

⁸⁷ Code Civ. Proc. N. Y. § 2620. For cases construing this portion of the section, see *In re Wilcox's Will*, 59 Hun. 627, 14 N. Y. Supp. 109; *In re Briggs' Will*, 47 App. Div. 47, 62 N. Y. Supp. 294; *In re Townley*, 1 Con. Sur. 400, 4 N. Y. Supp. 455.

When a witness, or all the witnesses, to a will apparently executed in due form are dead, a presumption of proper execution arises upon proof of the handwriting of the testator and the deceased witnesses, and statutes have occasionally been enacted to that effect.⁸⁸ The testimony of the surviving witnesses, if there are any, must, however, be procured.⁸⁹ Signatures are proved in the usual manner—commonly by witnesses who are familiar with the handwriting of the deceased.⁹⁰ Proof of the testator's signature may be made by a surviving witness,⁹¹ even where he signs by mark.⁹² But where the alleged signature is by mark, and one witness is dead, while the other remembers nothing about the circumstances of the execution, there is not sufficient proof of the testator's signature, although the will contains a complete attestation clause.⁹³

When the witnesses are beyond the jurisdiction, the will may generally be proved in the same manner as when they are dead.⁹⁴

DECLARATIONS OF THE TESTATOR AS EVIDENCE OF EXECUTION

78. The declarations of the testator are receivable to show the execution of the will only when they are so closely associated with the act as to be a part thereof.

The rule that the declarations of the testator, to be admissible as bearing upon the question of due execution, must be a part of the

⁸⁸ *Barnewall v. Murrell*, 108 Ala. 366, 18 South. 831; *Woodruff v. Hundley*, 127 Ala. 640, 29 South. 98, 85 Am. St. Rep. 145 (where the will bore the word "witness" to the left of the signatures); *Scott v. Hawk*, 107 Iowa, 723, 77 N. W. 467, 70 Am. St. Rep. 228; *Robinson v. Brewster*, 140 Ill. 649, 30 N. E. 683, 33 Am. St. Rep. 265; *Hobart v. Hobart*, 154 Ill. 610, 39 N. E. 581, 45 Am. St. Rep. 151; *In re Klett's Will*, 3 Misc. Rep. 385, 24 N. Y. Supp. 721; *In re Kane*, 2 Con. Sur. 249, 20 N. Y. Supp. 123; *In re Smith*, 61 Hun, 101, 15 N. Y. Supp. 425; *In re Thomas*, 111 N. C. 409, 16 S. E. 226; *Harris v. Harris*, 10 Wash. 556, 39 Pac. 148.

This presumption is not one of law, but of fact, which the jury may make in determining the question of due execution. *Woodruff v. Hundley*, 127 Ala. 640, 29 South. 98, 85 Am. St. Rep. 145.

⁸⁹ *Barnewall v. Murrell*, 108 Ala. 366, 18 South. 831.

⁹⁰ *Snider v. Burks*, 84 Ala. 53, 4 South. 225; *In re Berg's Estate*, 173 Pa. 647, 34 Atl. 234.

⁹¹ *Hobart v. Hobart*, 154 Ill. 610, 39 N. E. 581, 45 Am. St. Rep. 151.

⁹² *In re Dockstader*, 6 Dem. Sur. (N. Y.) 106; *In re Wilson's Will*, 76 Hun, 1, 27 N. Y. Supp. 957.

⁹³ *Worden v. Van Gleson*, 6 Dem. Sur. (N. Y.) 237. See, also, *In re Porter's Will* (Sur.) 1 Misc. Rep. 262, 22 N. Y. Supp. 1062; *In re Phelps*, 1 Con. Sur. 463, 5 N. Y. Supp. 270.

⁹⁴ *In re Hull's Will*, 117 Iowa, 738, 89 N. W. 979; *In re Allison's Estate*, 104 Iowa, 130, 73 N. W. 489; *In re Dates*, 58 Hun, 608, 12 N. Y. Supp. 205.

res gestæ, is supported by the weight of authority.⁹⁵ But it has been held that where the subscribing witnesses are dead or inaccessible, and there are no persons living known to have been present at the execution, and the will contains no recitals of what occurred at the time, declarations of the testator as to the manner in which it was executed are admissible.⁹⁶

Other Relevant Matters

The fact that the scrivener who had charge of the execution had been a probate judge, and had had much experience in preparing wills, is relevant upon the question of due execution.⁹⁷

The ordinary principles control in proof of handwriting. Expert evidence may be received, and also that of parties who are acquainted with the writing of the person whose signature is in question.⁹⁸ So, where the body of a will was written in different inks and at different times, an expert may testify as to the approximate ages of inks when appearing on paper, and may give his opinion that certain parts of the will were written after execution.⁹⁹

Where, to impeach a subscribing witness, he was shown to have said, after the testator's death, that he would fabricate a will, it is competent to prove, in rebuttal, that, prior to the testator's death, he had said that the testator had made a will.¹⁰⁰

Where a codicil to a will which is improperly executed, recites the execution of the will, and is itself properly executed, the due execution of both is thereby effected.¹⁰¹

⁹⁵ *Stevens v. Van Cleve*, 4 Wash. C. C. 262, Fed. Cas. No. 13,412; *Comstock v. Society*, 8 Conn. 254, 20 Am. Dec. 100; *Walton v. Kendrick*, 122 Mo. 504, 27 S. W. 872, 25 L. R. A. 701; *In re Gordon*, 50 N. J. Eq. 397, 26 Atl. 208; *Lane v. Hill*, 68 N. H. 275, 44 Atl. 393, 73 Am. St. Rep. 591; *Kennedy v. Upshaw*, 64 Tex. 411. And see *Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71, and *Wigmore on Ev.* § 1736.

⁹⁶ *In re Oliver's Will* (Sur.) 13 Misc. Rep. 466, 34 N. Y. Supp. 706.

When the testator's knowledge that the instrument was a will is in issue, subsequent declarations showing that he was aware of its character are admissible, as showing his state of mind. *Nelson's Will*, 141 N. Y. 152, 36 N. E. 3.

⁹⁷ *Gable v. Rauch*, 50 S. C. 95, 27 S. E. 555. And this fact may be decisive of the question of due execution. *In re Merriman*, 62 Hun, 621, 16 N. Y. Supp. 738.

⁹⁸ *In re Berg's Estate*, 173 Pa. 647, 34 Atl. 234.

⁹⁹ *In re Walt's Will* (Sur.) 1 N. Y. Supp. 784.

¹⁰⁰ *In re Hesdra's Will*, 119 N. Y. 615, 23 N. E. 555.

¹⁰¹ *In re Murfield's Will*, 74 Iowa, 479, 38 N. W. 170.

CHAPTER IX

REVOCATION AND REPUBLICATION OF WILLS

- 79-80. Revocation Defined—How Effected.
- 81. Mutilation as Effecting Revocation.
- 82. Intent to Revoke Essential.
- 83-85. Effect of Alterations and Interlineations.
- 86. Revocation by a Subsequent Writing.
- 87-88. Revocation by Change of Circumstances.
- 89. Evidence of Revocation—Burden of Proof.
- 90-92. Republication Defined—How Effected.

REVOCATION DEFINED—HOW EFFECTED

79. A will may be revoked at the pleasure of the testator. Revocation is an act of the mind, terminating the potential capacity of the will to operate at the death of the testator, manifested by some outward and visible act or sign, symbolic thereof.
80. The methods by which this act of the mind may be effectually manifested are prescribed by statute. They are ordinarily:
- (a) Mutilation.
 - (b) A subsequent writing revoking the will, either in terms or by implication.
 - (c) Certain well-defined changes in the circumstances and condition of the testator, from which a revocation will be implied by law.

Revocability is a leading characteristic of wills,¹ and, prior to the enactment of the statute of frauds, an intent to revoke adequately manifested, as by oral declarations, was sufficient to this end.² Owing to the opportunities for fraud thus afforded, this statute provided that no written will should be orally repealed or altered, and further enacted the precise methods by which revocation of wills disposing of realty might be effected,³ and similar provisions were subsequently extended to wills of all sorts of property.⁴ This legislation has, with minor modifications, been generally followed in the

¹ Ante, p. 17.

² Brooke v. Ward, Dyer, 310b. See Card v. Grinman, 5 Conn. 164.

³ 29 Car. II, §§ 6, 22 (1677).

⁴ 1 Vict. c. 26, § 20 (1837).

United States, and the substantial methods of revocation are those indicated in the black-letter text.⁵

A revocation, then, to be effectual, must take one or another of the statutory forms. An oral attempt to revoke is inoperative, however unquestionable the intent to that end may be,⁶ as is the mere intention to revoke in the future,⁷ or even in the present, unattended by the requisite statutory manifestations. This view is emphasized by the doctrine, supported by the decided weight of authority, that no revocation results where the testator's unquestioned intent to destroy his will is thwarted by the fraud of a beneficiary, or of any party. Thus, where X. brought a will to a blind testator at the latter's request, who, after feeling of the seals of the envelope in which it was inclosed, requested X. to throw it into the fire, and X. pretended to do so, substituting, however, another paper for the will, and calling the testator's attention to the odor and the crackling of the burning paper, in consequence of which the testator died in the belief that his will had been revoked, it was held that there was no sufficient revocation.⁸ "The law will not permit the formalities of the execution of a will to be dispensed with because of fraudulent interference, and the same rule must be applied in respect to the statutory requisites of revocation."⁹ This doctrine is absolutely sound in principle, if one bears in mind the fact that

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⁵ The words used in the statutes relative to revocation clearly apply only to wills in writing. On principle, therefore, it is evident that a valid oral will still may be revoked by any expression of the testator indicating that he does not wish such will to operate at his death.

⁶ *Slaughter v. Stephens*, 81 Ala. 418, 2 South. 145; *Perjue v. Perjue*, 4 Iowa, 520; *Wittman v. Goodhand*, 26 Md. 95; *Jones v. Moseley*, 40 Miss. 261, 90 Am. Dec. 327; *Jackson v. Kniffen*, 2 Johns. (N. Y.) 31, 3 Am. Dec. 390; *In re Hammond's Will* (Sur.) 4 N. Y. Supp. 456; *Kent v. Mahaffey*, 10 Ohio St. 204; *Hylton v. Hylton*, 1 Grat. (Va.) 161; *Schouler, Wills*, § 382.

Neither can a written will be revoked by a subsequent nuncupative will. *McCune's Devisees v. House*, 8 Ohio, 144, 31 Am. Dec. 438.

⁷ *Rife's Appeal*, 110 Pa. 232, 1 Atl. 226; *Belshaw v. Chitwood*, 141 Ind. 377, 40 N. E. 908; *Succession of Hill*, 47 La. Ann. 329, 16 South. 819.

The subsequent recognition of the legitimacy of a child disinherited on the alleged ground that the testator was not her father does not effect a revocation of the will. *In re Padelford's Estate*, 190 Pa. 35, 42 Atl. 381.

⁸ *Kent v. Mahaffey*, 10 Ohio St. 205. Accord: *Bobleber v. Rebstock*, 255 Ill. 53, 99 N. E. 75, 41 L. R. A. (N. S.) 105, Ann. Cas. 1913D, 307; *Boyd v. Cook*, 3 Leigh (Va.) 32; *Hise v. Fincher*, 32 N. C. 139, 51 Am. Dec. 383; *Graham v. Burch*, 47 Minn. 171, 49 N. W. 697, 28 Am. St. Rep. 339; *Silva's Estate* (1915) 169 Cal. 116, 145 Pac. 1015.

See, also, *Malone's Adm'r v. Hobbs*, 1 Rob. (Va.) 346, 39 Am. Dec. 263; *Clingan v. Mitcheltree*, 31 Pa. 27; *Gains v. Gains*, 2 A. K. Marsh. (Ky.) 190, 12 Am. Dec. 375; *Doe dem. Reed v. Harris*, 6 Ad. & El. 209.

⁹ *Vanderburgh, J.*, in *Graham v. Burch*, 47 Minn. 171, 49 N. W. 697, 28 Am. St. Rep. 339.

revocation is purely a question of complying with the requirements of the statute,¹⁰ and the few courts which have reached a contrary conclusion¹¹ have thereby furnished conspicuous instances of judicial legislation.

So fraud on the part of a beneficiary in falsely representing to the testator that his desire to have his will destroyed had been carried out, whereby he was prevented from destroying the will or executing another, does not result in a revocation of the will.¹²

If any remedy is to be obtained against a beneficiary who has fraudulently prevented a revocation, it should be sought by a bill in equity asking that beneficiary be decreed a constructive trustee for those who lose by his wrongful act.¹³

MUTILATION AS EFFECTING REVOCATION

81. Mutilation includes any impairment, however slight, of the material upon which the will is written, by which the physical integrity of the document as an entirety is affected, or any obscuration or interference with the writing, accompanied by an intent that the instrument, as a whole, or a particular part thereof, shall be revoked. To effect a revocation, the act of mutilation must be done by the testator, or by a person in his presence and by his direction.

Statutes usually provide for the revocation of a will in the manner above indicated, and, as in the case of execution, the act must be done by the testator, or in his presence and at his express direction. He cannot delegate such authority to another, to be executed

¹⁰ No doubt, were the statutes silent on this point, every court in the land would agree that there was a sufficient revocation in *Kent v. Mahaffey*, 10 Ohio St. 205.

¹¹ *Pryor v. Coggln*, 17 Ga. 444; *Ford v. Ford*, 7 Humph. (Tenn.) 92; *Smiley v. Gambill*, 2 Head (Tenn.) 164. See, also, *RIGGS v. PALMER*, 115 N. Y. 506, 22 N. E. 188, 5 L. R. A. 340, 12 Am. St. Rep. 819, *Dunmore Cas. Wills*, 77.

¹² *Mundy v. Mundy*, 15 N. J. Eq. 290; *Trice v. Shipton* (Ky.) 67 S. W. 377. The same rule prevails when the testator has been prevented from revoking his will by undue influence. *Floyd v. Floyd*, 3 Strob. (S. O.) 44, 49 Am. Dec. 626; *Smith v. Fenner*, 1 Gall. 170, Fed. Cas. No. 13,046.

¹³ A few courts have intimated that such a remedy is available. *Trice v. Shipton*, 67 S. W. (Ky. 1902) 377; *Gains v. Gains*, 2 A. K. Marsh. (Ky.) 190, 12 Am. Dec. 375; *Blanchard's Heirs v. Blanchard's Heirs*, 32 Vt. 62. But, in *Kent v. Mahaffey*, 10 Ohio St. 204, 220, in answer to such a suggestion, Peck, J., says: "The fraudulent prevention of its revocation could not well be tortured into a promise to hold for the heir at law; and to hold the legatee a trustee in such case would seem to nullify the statute prohibiting revocations except in a specified manner."

elsewhere, or after his death.¹⁴ It should follow that there can be no subsequent ratification of an act of mutilation not previously authorized.¹⁵ Where, however, a will has been defaced and mutilated by vermin, the adoption of this defacement by the testator with intent to revoke is sufficient.¹⁶

What Mutilation is Sufficient

It is not necessary that the mutilation result in the destruction of the instrument, or that it be torn in pieces.¹⁷ The cases abundantly support the statement in the black-letter text. Any visible burning of the paper upon which the will is written, if caused *animo revocandi*, is enough. Thus, where the testator threw the will into a fire, with intent to destroy it, and it was snatched—only slightly singed—from the flames by another, the revocation was complete.¹⁸ But an unsuccessful attempt to burn effects no revocation; neither does a burning of the envelope containing the will, the latter document remaining unscathed.¹⁹

¹⁴ Appeal of Miles, 68 Conn. 237, 36 Atl. 39, 36 L. R. A. 176; Cheever v. North, 106 Mich. 390, 64 N. W. 455, 37 L. R. A. 561, 58 Am. St. Rep. 499; In re Ackels' Estate, 23 Misc. Rep. 321, 52 N. Y. Supp. 246; In re Hopkins' Will, 35 Misc. Rep. 702, 72 N. Y. Supp. 415, Id., 73 App. Div. 559, 77 N. Y. Supp. 178; Dower v. Seeds, 28 W. Va. 113, 57 Am. Rep. 646; Stockwell v. Ritherden, 12 Jur. 779. And see McCarrh v. Rundall, 111 Iowa, 406, 82 N. W. 924; 1 Jar. Wills, 114.

Destruction of the will without the consent of the testator is of course inoperative. Trevelyan v. Trevelyan, 1 Phillim. 149.

¹⁵ Mundy v. Mundy, 15 N. J. Eq. 290; Clingan v. Mitcheltree, 31 Pa. 25; Gill v. Gill (1909) Prob. 157, 2 B. R. O. 544. See, also, Mills v. Millward, 15 Prob. Div. 20.

It is sometimes intimated that there may be a ratification of an unauthorized destruction of a will. See Steele v. Price, 44 Ky. (5 B. Mon.) 58; Appeal of Deaves, 140 Pa. 242, 21 Atl. 395; Parsons v. Balson, 129 Wis. 311, 109 N. W. 136.

¹⁶ Cutler v. Cutler, 130 N. C. 1, 40 S. E. 689, 57 L. R. A. 209, 89 Am. St. Rep. 854.

Of course no question of ratification is here involved. It is possible that any injury inflicted upon the will, regardless of its origin, might be adopted by the testator for purposes of revocation.

¹⁷ 1 Wms. Ex'rs, 173; Bibb dem. Mole v. Thomas, 2 W. Bl. 1043.

¹⁸ Bibb dem. Mole v. Thomas, supra. Though somewhat criticised (see Reed v. Harris, 6 Ad. & El. 209), this case remains unshaken; it is thoroughly sound, in principle. For a similar case, see White v. Casten, 46 N. C. 197, 59 Am. Dec. 585, wherein the court say: "The principle * * * is that, where the revocation of a will is attempted by burning, there must be a present intent on the part of the testator to revoke, and this intent must appear by some act or symbol, appearing on the script itself, so that it may not rest upon mere parol testimony, and if the script is in any part burnt or singed it is sufficient to revoke the will." Consequently the destruction of a document incorporated by reference into the will does not destroy the will. Paige v. Brooks, 75 Law T. R. 455.

¹⁹ Doe dem. Reed v. Harris, 6 Ad. & El. 209.

So any tearing of the material upon which the will is written, however slight, whether it affects a material or immaterial portion of the writing,²⁰ is sufficient to revoke, if accompanied with an intent to that end. And cutting is equivalent to tearing.²¹ The removal of the fastening, such as a pin, by which the separate sheets on which a will is written are attached, is not a tearing apart, for purposes of revocation;²² neither is the cutting off of matter added after the execution of the will, though the cut passes through the name of one of the attesting witnesses, in the absence of proof that the mutilation was made with intent to revoke.²³

The tearing away of a seal, with intent to revoke, is sufficient, though no seal be necessary to the due execution of the will,²⁴ as is also the drawing of lines through the signature,²⁵ though it remains visible,²⁶ and though they be drawn with a lead pencil.²⁷ Cutting off the signature,²⁸ or scratching it away with a penknife,²⁹ is a sufficient mutilation to satisfy the statute.

All Mutilation Intended must be Accomplished

Be the mutilation much or little, all that the testator intended to effect must be accomplished, before the act of revocation is complete. If testator changes his mind, and turns aside from his purpose while in the act of accomplishing it, there is no revocation. Thus, where a testator, after a quarrel with the principal beneficiary, in a rage tore the will twice through, but was induced to desist from further mutilation, and he retained the document and expressed his pleasure that it was no worse, the question was left to the jury as to whether the testator had desisted before completing all he in-

²⁰ *In re Jones' Estate*, 2 Ohio, N. P. 209; *Goods of Lewis*, 1 Sw. & Tr. 31; *Brown's Will*, 1 B. Mon. (Ky.) 56, 35 Am. Dec. 174.

²¹ *Burton v. Wylde*, 261 Ill. 397, 103 N. E. 976; *Hobbs v. Knight*, 1 Curt. 768; *In re Cooke*, 5 Notes Cas. 390; *Clarke v. Scripps*, 2 Robert. 563.

²² *Woodruff v. Hundley*, 127 Ala. 640, 29 South. 98, 85 Am. St. Rep. 145.

²³ *In re Taylor's Goods*, 63 Law T. 230.

²⁴ *Price v. Powell*, 3 H. & N. 341; *Avery v. Pixley*, 4 Mass. 460; *In re White's Will*, 25 N. J. Eq. 501. And see *Johnson v. Brallsford*, 2 Nott & McC. (S. C.) 272, 10 Am. Dec. 601.

²⁵ *Townshend v. Howard*, 86 Me. 285, 29 Atl. 1077; *In re Brookman* (Sur.) 11 Misc. Rep. 675, 33 N. Y. Supp. 575.

²⁶ *Baptist Church v. Robbarts*, 2 Pa. 110.

²⁷ *Woodfill v. Patton*, 76 Ind. 575, 40 Am. Rep. 269 (under a statute providing for revocation by destruction or mutilation); *Townshend v. Howard*, 86 Me. 285, 29 Atl. 1077.

²⁸ *Sanders v. Babbitt*, 106 Ky. 646, 51 S. W. 163; *Francis' Will*, 73 Misc. Rep. 148, 132 N. Y. Supp. 695.

²⁹ *In re Morton*, 12 P. D. 14. But where the signature, under such circumstances, remained legible, it was held that there was no revocation, within 1 Vict. c. 26, § 21 (see post, p. 229); *In re Godfrey*, 1 Reports, 484, 69 Law T. 22.

tended to do, and a verdict for the will was sustained.⁸⁰ But the fact that testator was prevented by another from the complete destruction of his will, as he had intended, did not prevent a revocation, where testator did not change his intention and sufficiently mutilated the will to comply with the statutory requirements.⁸¹

Mutilation of Will Executed in Duplicate

If a will be executed in duplicate, and the testator keeps one copy and deposits the other elsewhere, a mutilation by him of the part in his own custody is a revocation of both.⁸² The presumption in such a case is that the mutilation of the one duplicate was done with intent to revoke as to both, though such presumption may be rebutted.⁸³

Cancellation

Under statutes which provide that no alteration or obliteration, unattested, shall be valid, except in so far as the former language of the will is not apparent in consequence thereof, no revocation can be effected by cancellation unless the will is thereby rendered illegible by natural means. Such is the case under the English statute of wills,⁸⁴ and in a number of American jurisdictions.

But in the absence of provisions of this character, any interference with the writing of a will, as by drawing crossed lines there-

⁸⁰ *Perkes v. Perkes*, 3 B. & Ald. 489; *Elms v. Elms*, 1 Sw. & Tr. 155 (accord).

⁸¹ *BIBB v. THOMAS*, supra. See, also, *Sweet v. Sweet*, 1 Redf. Sur. (N. Y.) 451 (where will held revoked after a tearing by testator, although fragments sewed together by testator's wife in such a way as to make instrument perfectly legible).

⁸² *Schofield's Will*, 72 Misc. Rep. 281, 129 N. Y. Supp. 190; *Colvin v. Fraser*, 2 Hagg. 266; *Onions v. Tyrer*, 1 P. Wm. 346; *Rickards v. Mumford*, 2 Phillim. 23; *Burtenshaw v. Gilbert*, Cowp. 49; 1 Wms. Ex'rs, 191.

A presumption to revoke both was also said to arise, in *Pemberton v. Pemberton*, 13 Ves. Jr. 290, upon a destruction of one of two duplicates by testator when both were in his possession.

⁸³ *Managle v. Parker*, 75 N. H. 139, 71 Atl. 637, 24 L. R. A. (N. S.) 180; Ann. Cas. 1912A, 269; 1 Wms. Ex'rs, 192.

⁸⁴ 1 Vict. c. 26, § 21; 1 Jar. Wills, 116; *In re Horsford*, L. R. 3 P. & D. 211; *Stephens v. Taprell*, 2 Curt. 458; *Hobbs v. Knight*, 1 Curt. 779; *In re Brewster*, 6 Jur. N. S. 56; *In re Godfrey*, 1 Reports, 484, 69 Law T. 22.

A testator pasted strips of paper over certain passages in his will. In 1874 probate of the will was granted, with these passages blank on the assumption that they could not be ascertained by inspection. In 1893 it was found that these passages were legible, and could be read without artificial means. Held, that they must be admitted to probate. *Finch v. Combe*, 6 Reports, 545; *Id.* (1894) Prob. 191.

Glasses may be used to discover what the words obliterated originally were. *In re Ibbetson*, 2 Curt. 337; *Lushington v. Onslow*, 6 Notes Cas. 187.

on,³⁵ or straight lines through clauses thereof, whether with ink or lead pencil,³⁶ is sufficient, if accompanied with intent to revoke. But the cancellation of the words "last will and testament" upon the envelope containing the will does not effect a revocation.³⁷

While there is some authority for the view that the writing of the words, "This will is hereby canceled," or others of similar import, upon the paper containing the will, though not upon any portion of the language of the will, is to be treated as a cancellation,³⁸ yet on principle and by weight of authority this can have no such effect. Such a writing merely amounts to an unattested instrument of revocation, and is inoperative.³⁹

Partial Revocation

Under statutes which provide for the revocation of the whole or any part of a will by mutilation, a part only may be thus revoked, if such be the testator's intent, provided that the change has a revocatory effect only, and does not effect a new testamentary disposition.⁴⁰ A partial revocation, which merely enlarges the residuary gift, is usually held not to create a new disposition.⁴¹ Where

³⁵ Warner v. Warner's Estate, 37 Vt. 356; In re Alger's Will (Sur.) 38 Misc. Rep. 143, 77 N. Y. Supp. 166; Dammann v. Dammann (Md.) 28 Atl. 408.

³⁶ Bigelow v. Gillott, 123 Mass. 102, 25 Am. Rep. 32; Glass v. Scott, 14 Colo. App. 377, 60 Pac. 186; Frothingham's Will (1908) 75 N. J. Eq. 205, 71 Atl. 695; Goods of Harris, 3 Sw. & Tr. 485; In re Tomlinson's Estate, 133 Pa. 245, 19 Atl. 482, 19 Am. St. Rep. 637; Succession of Batchelor, 48 La. Ann. 278, 19 South. 283; In re Olmstead's Estate, 122 Cal. 224, 54 Pac. 745.

In England cancellations in pencil are regarded as presumptively deliberative. Mence v. Mence, 18 Ves. 348; In re Hull, L. R. 2 P. & D. 256. But this doctrine has generally been repudiated in the American cases. Woodfill v. Patton, 76 Ind. 575, 40 Am. Rep. 269; Hilyard v. Wood, 71 N. J. Eq. 214, 63 Atl. 7; Tomlinson's Estate, 133 Pa. 245, 19 Atl. 482, 19 Am. St. Rep. 637.

³⁷ Grantley v. Garthwaite, 2 Russ. 90.

³⁸ Warner v. Warner's Estate, 37 Vt. 356. And see Evans' Appeal, 58 Pa. 238; Billington v. Jones, 108 Tenn. 234, 66 S. W. 1127, 56 L. R. A. 654, 91 Am. St. Rep. 751.

³⁹ Ladd's Will, 60 Wis. 187, 18 N. W. 734, 50 Am. Rep. 355; Matter of Miller, 50 Misc. Rep. 70, 100 N. Y. Supp. 344; Lewis v. Lewis, 2 Watts & S. (Pa.) 455; HOWARD v. HUNTER, 115 Ga. 357, 41 S. E. 638, 90 Am. St. Rep. 121, Dunmore Cas. Wills, 139; Oetjen v. Oetjen, 115 Ga. 1004, 42 S. E. 387. See 1 Redf. Wills, 318, note.

⁴⁰ Larkins v. Larkins, 3 B. & P. 16; Swinton v. Bailey, 4 App. Cas. 70; In re Leach's Goods, 63 Law T. 111; Tudor v. Tudor, 17 B. Mon. (Ky.) 383; Wheeler v. Bent, 7 Pick. (Mass.) 61; In re Penniman's Will, 20 Minn. 245 (Gil. 220), 18 Am. Rep. 368; Stover v. Kendall, 1 Cold. (Tenn.) 557; Hubbard v. Hubbard, 99 Ill. App. 555; In re Hull's Will, 117 Iowa, 738, 89 N. W. 979; Varnon v. Varnon, 67 Mo. App. 534; In re Ramsey's Estate, 13 Pa. Co. Ct. R. 135; In re Oberdorf's Estate, 2 Lack. Leg. N. (Pa.) 43; Brown v. Brown, 91 S. C. 101, 74 S. E. 135.

⁴¹ Bigelow v. Gillott, 123 Mass. 102, 25 Am. Rep. 32; Collard v. Collard

the statute is silent with regard to revocation of part by mutilation, the tendency is to regard such revocation as impossible, and to give no effect thereto if the part remains legible,⁴² though there is authority the other way.⁴³

The destruction of a codicil on a separate paper will not effect a revocation of the will, though such was the testator's intent,⁴⁴ but when a codicil on the same sheet of paper as the will, which made an insignificant change in the provisions thereof, was canceled, a revocation of both will and codicil was, in view of all the circumstances, regarded as intended.⁴⁵

The destruction of a will does not necessarily revoke a codicil to it, when the codicil is capable of standing alone as an independent disposition.⁴⁶ In several states, however, the statutes provide that the revocation of a will revokes all of its codicils, and in the absence of such a statute, a codicil should be admitted to probate, without the will to which it refers, only when proponent shows that testator intended that it should operate separately from the will.⁴⁷ The question largely turns upon the contents of the will and codicil. If the dispositions in the two instruments are so involved the one with the other as to be incapable of a separate and independent existence, the destruction of one necessarily revokes the other.⁴⁸

INTENT TO REVOKE ESSENTIAL

82. The mutilation of a will, unaccompanied by an intent to thereby revoke it, is a nullity. A revocation, to be effectual in this form, must be made by or under the direction of a competent testator, and must not be the offspring of a mistake either of law or fact.

(N. J. Prerog. 1907) 67 Atl. 190. Contra: Miles' Appeal, 68 Conn. 237, 36 Atl. 39, 36 L. R. A. 176.

⁴² Law v. Law, 83 Ala. 432, 3 South. 752; Lovell v. Quitman, 88 N. Y. 377, 42 Am. Rep. 254; Eschbach v. Collins, 61 Md. 478, 48 Am. Rep. 123; Giffin v. Brooks, 48 Ohio St. 211, 31 N. E. 743.

⁴³ Bigelow v. Gillott, *supra*.

⁴⁴ Malone's Adm'r v. Hobbs, 1 Rob. (Va.) 346, 39 Am. Dec. 263. See, also, Osburn v. Rochester Trust & Safe Deposit Co., 152 App. Div. 235, 136 N. Y. Supp. 859.

⁴⁵ In re Brookman (Sur.) 11 Misc. Rep. 675, 33 N. Y. Supp. 575.

⁴⁶ Black v. Jobling, L. R. 1 P. & D. 685; Goods of Savage, L. R. 2 P. & D. 78; Goods of Turner, L. R. 2 P. & D. 403; Gardiner v. Courthope, 12 P. D. 14.

⁴⁷ Youse v. Forman, 68 Ky. (5 Bush) 337; In re Pepper's Estate, 148 Pa. 5, 23 Atl. 1039.

⁴⁸ 1 Jar. Wills, 125. See Gelbke v. Gelbke, 88 Ala. 427, 6 South. 834; Crafts v. Hunnewell, 129 Mass. 220.

Substantially as much capacity is required to revoke a will as to make one;⁴⁹ i. e., the testator must mentally retrace the ground he went over in constructing the will, and determine to undo it. Hence the destruction of a will by an insane testator is nugatory.⁵⁰ So is an accidental or inadvertent disfiguration, as where a testator unintentionally threw ink, instead of sand, upon his will.⁵¹ And mutilation is equally ineffective if made under a mistake of fact, as where a testator who had executed two wills wished to revoke one of them, and by mistake destroyed the wrong document;⁵² or under a mistake of law, as where a testatrix caused a codicil to be torn up under the mistaken belief that an inadvertent reversing of the day and the month in the blank spaces left for the date invalidated it,⁵³ or where a will is canceled under a mistake in law that a second will, complete in its execution, operates upon the property contained in the first, when it really does not,⁵⁴ or under a mistake as to the legal effect of a deed.⁵⁵

Mutilation induced by undue influence is inoperative,⁵⁶ as is also that occasioned by a third person in the lifetime, but without the consent, of the testator,⁵⁷ or after his death.⁵⁸

Doctrine of Dependent Relative Revocation

The rule is established that where the act of destruction is connected with the making of another will, so as fairly to raise the inference that the testator meant the revocation of the old to depend upon the efficacy of the new disposition intended to be substituted, such will be the legal effect of the transaction; and if, for any reason, the will intended to be substituted is inoperative, the revoca-

⁴⁹ In re Olmsted's Estate, 122 Cal. 224, 54 Pac. 745; Linkmeyer v. Brandt, 107 Iowa, 750, 77 N. W. 493; Rich v. Gilkey, 73 Me. 595; In re Goldsticker's Will, 192 N. Y. 35, 84 N. E. 581, 18 L. R. A. (N. S.) 99, 15 Ann. Cas. 66; Idley v. Bowen, 11 Wend. (N. Y.) 227; Goods of Hine (1893) Prob. 282.

⁵⁰ Brunt v. Brunt, L. R. 3 P. & D. 37; Scruby v. Fordham, 1 Ad. 74; Borlase v. Borlase, 4 Notes Cas. 139; In re Shaw, 1 Curt. 905; In re Downer, 18 Jur. 66; Ford v. Ford, 7 Humph. (Tenn.) 92; Forman's Will, 54 Barb. (N. Y.) 274.

⁵¹ Illustration of Lord Mansfield in Burtonshaw v. Gilbert, Cowp. 52.

⁵² Burns v. Burns, 4 Serg. & R. (Pa.) 295.

⁵³ Goods of Thornton, 14 P. D. 382. Here the last clause of the codicil, as executed, read: "In witness whereof I have hereunto set my hand this March day of 21st, 1899." Accord: Giles v. Warren, L. R. 2 P. & D. 401; Beardsley v. Lacey, 67 Law J. Prob. 35, 78 Law T. (N. S.) 25.

⁵⁴ Lord Ellenborough in Perrott v. Perrott, 14 East, 440.

⁵⁵ Goods of James, 19 Law T. 610.

⁵⁶ Rich v. Gilkey, 73 Me. 595; Laughton v. Atkins, 1 Pick. (Mass.) 535.

⁵⁷ Bennett v. Sherrod, 25 N. C. 303, 40 Am. Dec. 410; Mills v. Millward, 15 P. D. 20.

⁵⁸ Haines v. Haines, 2 Vern. 441; Goods of Leigh (1892) Prob. 82.

tion fails, and the original will remains in full force.⁵⁹ Thus, where a testator, after signing the draft of a second will, tore all the seals, save one, from the former, when, on being informed that the second will would not operate upon his lands in its then condition, he desisted, and died before the new will was complete, the original was held to be unrevoked.⁶⁰ So, if the later of two inconsistent wills is destroyed on the erroneous supposition that the earlier will is thereby revived, the later will remains unrevoked.⁶¹ For there is here merely a revocation conditioned upon the revival of the former will, and the failure of the condition defeats the operation of what would otherwise have been a revocation.

But a mere intent to make at some time a will in place of that destroyed will not ~~render~~ the destruction conditional. Thus, where a testator canceled his signatures and those of the subscribing witnesses, accompanying the act with the memorandum, "In consequence of the death of my wife it becomes necessary to make another will," and died before such will was made, the revocation of the will was absolute and complete.⁶²

EFFECT OF ALTERATIONS AND INTERLINEATIONS

83. When the cancellation or erasure of a part of a will is followed by the addition of new matter, either by interlineation or otherwise, or when such matter is added by interlineation, without cancellation or erasure, if such additions are made previous to the execution of the will, and by the testator, they operate as parts thereof.

⁵⁹ 1 Jar. Wills, 119; Goods of Applebee, 1 Hogg, 143; Goods of Eeles, 2 Sw. & Tr. 600; APPEAL OF STRONG, 79 Conn. 123, 63 Atl. 1089, 6 L. R. A. (N. S.) 1107, 118 Am. St. Rep. 138, Dunmore Cas. Wills, 143; Frothingham's Will (1908) 75 N. J. Eq. 205, 71 Atl. 695.

⁶⁰ Hyde v. Hyde, 1 Eq. Ab. 409, 3 Ch. Rep. 155.

This case might have gone upon the ground that the contemplated act of revocation was not complete. But in Onions v. Tyrer, 2 Vern. 742, it was held that when there was evidence that the testator tore up one will upon the execution of another, which was void by reason of not being attested in the testator's presence, the first will, which had been executed in duplicate, might be established in equity.

⁶¹ Powell v. Powell, L. R. 1 P. & D. 98, 209. See, also, Eckersley v. Platt, L. R. 1 P. & D. 281; In re Weston, 1 P. & D. 633.

⁶² Semmes v. Semmes, 7 Har. & J. (Md.) 388. Accord: McIntyre v. McIntyre, 120 Ga. 67, 47 S. E. 501, 102 Am. St. Rep. 71, 1 Ann. Cas. 606; Emernecker's Estate, 218 Pa. 369, 67 Atl. 701.

In Dixon v. Solicitor to the Treasury [1905] Prob. 42, 2 B. R. C. 534, the doctrine of dependent relative revocation was applied in a case where the document intended to be substituted for that which was destroyed was non-existent and never existed as a valid testamentary paper.

84. If made after execution, additions are inoperative, unless the will is re-executed, or unless there is a further execution with reference to the particular alterations.

85. In the absence of such execution, the canceled matter usually takes effect, as though no revocation had been attempted, when an endeavor is made to substitute new provisions for those canceled, by virtue of the doctrine of dependent relative revocation, or by express statutory provision.

There is substantial agreement as to these propositions. Alterations and interlineations made before execution are obviously a part of the will itself, and are probated as a part thereof;⁶³ and it is equally clear that, if made after execution, they can have, of themselves, no dispositive force,⁶⁴ unless duly executed.

So, when a portion of the will is altered, and matter substituted therefor, inoperative by reason of lack of due execution, the doctrine of conditional cancellation is recognized to its full extent. The validity of the cancellation is presumed to be conditional upon the operation of the substitution, in view of whose failure the will is given effect as though no change had been attempted. Thus, where the executor, at the request of the testator, subsequent to the execution of the will, and for the purpose of revoking a legacy, drew a line through the name of B., and wrote that of A. above, it was held that B. would take.⁶⁵ And when the erasure completely ob-

⁶³ Tyler v. Merchant Tailors' Co., 15 Prob. Div. 216.

⁶⁴ Hesterberg v. Clark, 166 Ill. 241, 46 N. E. 734, 57 Am. St. Rep. 135; Varnon v. Varnon, 67 Mo. App. 534; In re Simrell's Estate, 154 Pa. 604, 26 Atl. 599, 35 Am. St. Rep. 864.

⁶⁵ Wolf v. Bollinger, 62 Ill. 368. See Locke v. James, 11 M. & W. 901 (where the figure "6" was canceled, and the figure "2" written above, attempting to reduce a legacy from £600 to £200).

For other cases enunciating and applying the principle, see Hesterberg v. Clark, 166 Ill. 241, 46 N. E. 734, 57 Am. St. Rep. 135; Thomas v. Thomas, 76 Minn. 237, 79 N. W. 104, 77 Am. St. Rep. 639; In re Wilcox's Will (Sur.) 20 N. Y. Supp. 131; Gardiner v. Gardiner, 65 N. H. 230, 19 Atl. 651, 8 L. R. A. 383; In re Simrell's Estate, 154 Pa. 604, 26 Atl. 599, 35 Am. St. Rep. 864; In re Knapen's Will (1903) 75 Vt. 146, 53 Atl. 1003, 98 Am. St. Rep. 808; Goods of Greenwood (1892) Prob. 7. And see Maule v. Maule, 62 Law T. 702.

It is clear that, when the change is in the amount bequeathed, the principle of dependent relative revocation cannot be applied logically in every case.

Suppose two items in a will read thus: "First. I give ^{\$10000}~~\$5000~~ to A. Second.

I give ^{\$5}~~\$5000~~ to B." Suppose that it is proved that the alterations were made by testator and that there was no re-execution. It is evident that A. should receive \$5,000, since testator only cancelled to give him a larger bequest. But in B.'s case it is also evident that the revocation is not dependent upon

scures or removes the original matter, for which new matter is substituted, parol evidence may be received to show the original contents, which, thus proved, will be given effect.⁶⁶

If, however, testator intends to revoke, and the cancellation and interlineations are made with a view to the making of another will, the interlineations to serve as memoranda therefor, the revocation is then complete.⁶⁷

Alterations in a will by a stranger to it without the knowledge of the testator are without effect.⁶⁸ An erasure or alteration fraudulently made by a beneficiary therein avoids the provisions of the will in his favor,⁶⁹ though the evidence that alterations were thus made must be clear and satisfactory.⁷⁰ But an innocent alteration in immaterial particulars by such beneficiary does not affect the will.⁷¹

Presumption as to When Alterations were Made

The cases abound in the statement that where unattested alterations appear upon the face of the will, and no information can be given, and there are no circumstances, one way or the other, to show when the alterations were made, the presumption is that they were made after its execution.⁷² What this means, or at least should mean, is that the proponent of the will must show what it contained at the time of execution, and that commonly, when alterations or interlineations are present, the will, of itself, does not adequately indicate this. No presumption is really entertained either way, but the proponent, who alleges the contents to be so and so at the time of execution, should furnish satisfactory proof thereof.⁷³

the new disposition, and, in a jurisdiction permitting a partial revocation by cancellation, B. should receive nothing.

⁶⁶ Goods of Parr, 6 Jur. N. S. 56 (where a change was made in the executors); Goods of McCabe, L. R. 3 P. & D. 94 (where the name of a legatee had been erased).

⁶⁷ Bohanon v. Walcot, 1 How. (Miss.) 336, 29 Am. Dec. 631.

⁶⁸ Diener's Estate (1907) 79 Neb. 569, 113 N. W. 149, 14 L. R. A. (N. S.) 259.

⁶⁹ Thomas v. Thomas, 76 Minn. 237, 79 N. W. 104, 77 Am. St. Rep. 639. See, also, Doane v. Hadlock, 42 Me. 72; Wilson's Will, 8 Wis. 171; Jackson v. Malin, 15 Johns. (N. Y.) 293.

⁷⁰ Id.

⁷¹ McIntire v. McIntire, 19 App. D. C. 482.

⁷² Camp v. Shaw, 52 Ill. App. 241; In re Lang's Will (Sur.) 9 Misc. Rep. 521, 30 N. Y. Supp. 388; In re Oberdorf's Estate, 2 Lack. Leg. N. (Pa.) 43; Cooper v. Bockett, 4 Notes Cas. 685; Simmons v. Rudall, 1 Sim. N. S. 115; Williams v. Ashton, 1 Johns. & Hern. 115; Goods of Horsford, L. R. 3 P. & D. 211. See article, "Written Evidence and Alterations," 25 Har. L. R. 691, at 699.

Contra: Wikoff's Appeal, 15 Pa. 281, 53 Am. Dec. 597.

⁷³ Wilton v. Humphreys, 176 Mass. 253, 57 N. E. 374; Wigmore on Ev. § 2525.

The alteration would commonly cause uncertainty, which the proponent must dispel. And it seems to be admitted that interlineations which complete an otherwise imperfect sentence or expression raise no doubt as to the time of their insertion which requires to be removed.⁷⁴ So the presumption apparently fails, in a proceeding to set aside a will, already probated on the ground of alteration after execution.⁷⁵ And there is authority for the view, which is sound in principle, that where an interlineation or erasure in a will is fair upon its face, with no circumstance whatever to cast suspicion upon it, although wholly unexplained, there is no presumption that it was made after execution.⁷⁶ A material alteration, effected by the use of a chemical, is, under this doctrine, sufficiently suspicious to require satisfactory explanation from the proponent.⁷⁷

Whatever presumption there may be in this matter is readily overcome. A certificate in the attestation clause to the effect that the changes were made prior to execution is admissible for this purpose,⁷⁸ as are, also, declarations of the testator, made before or at the time of execution,⁷⁹ but not those made thereafter.⁸⁰

REVOCATION BY A SUBSEQUENT WRITING

86. A will may be revoked by a subsequent instrument executed solely for that purpose, by a subsequent will containing a revoking clause or provisions inconsistent with those of the previous will, or by a subsequent absolute conveyance of the property disposed of by the will.

The statute of frauds⁸¹ required all written revocations of wills of real property to be executed in substantially the same manner as testamentary dispositions, and the same requirements were extended to wills of personalty by the wills act of 1837.⁸² This legislation has been generally followed in the United States.

⁷⁴ *Goods of Ann Cadge*, L. R. 1 P. & D. 543.

⁷⁵ *Wilton v. Humphreys*, 176 Mass. 253, 57 N. E. 374.

⁷⁶ *CROSSMAN v. CROSSMAN*, 95 N. Y. 145, *Dunmore-Cas. Wills*, 12; *In re Voorhees*, 6 Dem. Sur. (N. Y.) 162; *In re Carver's Estate* (Sur.) 3 Misc. Rep. 567, 23 N. Y. Supp. 753; *In re Tighe's Will* (Sur.) 24 Misc. Rep. 459, 53 N. Y. Supp. 718; *In re Potter's Will* (Sur.) 12 N. Y. Supp. 105.

⁷⁷ *In re Dwyer's Will* (Sur.) 29 Misc. Rep. 382, 61 N. Y. Supp. 903.

⁷⁸ 1 Greenl. Ev. § 564; *CROSSMAN v. CROSSMAN*, 95 N. Y. 145, *Dunmore Cas. Wills*, 12.

⁷⁹ *Doe ex dem. Shallcross v. Palmer*, 16 Q. B. 747; *In re Hardy*, 30 L. J. Prob. 142; *In re Sykes*, L. R. 3 P. & D. 26; *Dench v. Dench*, 2 P. D. 60.

⁸⁰ *Doe ex dem. Shallcross v. Palmer*, *supra*.

⁸¹ 29 Car. II, c. 3, § 6 (1677).

⁸² 1 Vict. c. 26, § 20. Prior to this statute, a will of personalty might be

Formal Instrument of Revocation

Statutes commonly provide for revocation by an instrument designed for that purpose only, executed as above indicated. No matter how strongly such a document may express the testator's intention to revoke, it is ineffectual unless executed with the same formalities with which the will itself is required to be executed.⁸³

Revocation by Subsequent Will or Codicil

A will may be revoked by a subsequent will containing an express clause of revocation, and the revocation will not be affected by the fact that its other dispositions are void⁸⁴ for any reason not connected with the execution of the will, as where the second will disposes of property for charity, and is not made a sufficient time previous to the testator's death,⁸⁵ or because the will has been lost, and none of its contents can be proved, save the revoking clause.⁸⁶ The revoking clause may, by its terms, be limited in operation to a

revoked by any instrument, however informal in matter or execution (1 Wms. Ex'rs, 197), and, previous to the statutes of frauds, by parol (Brooke v. Ward, Dyer, 310b).

For valid revocation by letter (construing the statute of frauds), see Walcott v. Ochterleny, 1 Curt. 580.

⁸³ Nelson v. Public Adm'r, 2 Bradf. Sur. (N. Y.) 210; In re Akers' Will (1903) 173 N. Y. 620, 66 N. E. 1103.

See, also, Castens v. Murray, 122 Ga. 396, 50 S. E. 131, 2 Ann. Cas. 590; Succession of Seymour, 48 La. Ann. 903, 20 South. 217; Reid v. Borland, 14 Mass. 208; In re Voorhis' Will, 54 Hun, 637, 7 N. Y. Supp. 596; Morey v. Sohler, 63 N. H. 507, 3 Atl. 636, 56 Am. Rep. 538; Noyes' Will, 61 Vt. 14, 17 Atl. 743; Brook v. Chappell, 34 Wis. 405 (holding that a nuncupative will could not revoke a prior written will).

In New York a will may be revoked by a written instrument expressly setting forth the intention to revoke, and executed in the manner in which wills are required to be executed. Thus a will may be revoked by a deed of trust containing a clause of revocation, and executed in the manner prescribed for the execution of such deed. In re Backus' Will, 49 App. Div. 410, 63 N. Y. Supp. 544 (construing 2 Rev. St. [1st Ed.] pt. 2, pp. 64, 65, c. 6, tit. 1, §§ 42, 43, 47, 48).

But where it appears that the beneficiary under a prior will has suppressed a later will containing a revoking clause, the law will presume the later will to have been duly drawn and executed. In re Lamble's Estate, 97 Mich. 49, 56 N. W. 223.

⁸⁴ Burns v. Travis, 117 Ind. 44, 18 N. E. 45; Dudley v. Gates, 124 Mich. 440, 83 N. W. 97, 86 N. W. 959; In re Scott's Will, 88 Minn. 386, 93 N. W. 109; Tupper v. Tupper, 1 K. & J. 665.

See, however, Security Co. v. Snow, 70 Conn. 288, 39 Atl. 153, 66 Am. St. Rep. 107.

⁸⁵ In re Teacle's Estate, 153 Pa. 219, 25 Atl. 1135.

⁸⁶ Wallis v. Wallis, 114 Mass. 510; Williams v. Miles (1903) 68 Neb. 463, 94 N. W. 705, 96 N. W. 151, 62 L. R. A. 383, 110 Am. St. Rep. 431, 4 Ann. Cas. 306; IN RE CUNNINGHAM, 38 Minn. 169, 36 N. W. 269, 8 Am. St. Rep. 650, Dunmore Cas. Wills, 145.

part only of the prior will.⁸⁷ A will containing a clause of this character may operate as a revoking instrument, without probate.⁸⁸

To be effectual, however, the clause of revocation must indicate an actual and present intention to revoke the prior will. If it is merely declaratory of a future design, it is not sufficient;⁸⁹ and a will, obtained by undue influence, which revokes a prior will, is ineffectual to that end.⁹⁰

A revocation of "all former wills" extends to all former codicils, since a codicil is a will within the common understanding of the term.⁹¹

The fact that the will contains a revoking clause does not effect a revocation if the entire language of the will and the circumstances attending its execution show that no actual or complete revocation was intended.⁹²

Revocation by Will Containing Inconsistent Provisions

A prior will may be revoked by a subsequent will or codicil to the extent that its provisions are so inconsistent with those of the prior will as to be incapable of standing together with them. If the second will be partly inconsistent with one of an earlier date, the for-

⁸⁷ *Nelson's Estate*, 147 Pa. 160, 23 Atl. 373; *In re Fence's Estate* (1895) 2 Ch. 778.

⁸⁸ *Blackett v. Ziegler* (1911) 153 Iowa, 344, 133 N. W. 901, 37 L. R. A. (N. S.) 291, Ann. Cas. 1913E, 115; *MATTER OF CUNNINGHAM*, 38 Minn. 169, 38 N. W. 269, 8 Am. St. Rep. 650, Dunmore Cas. Wills, 145; *In re Barnes' Will*, 70 App. Div. 523, 75 N. Y. Supp. 373.

In a few jurisdictions, a revocation by will takes effect only when the will of which it forms a part becomes effective at the testator's death. *Bates v. Hacking* (1907) 28 R. I. 523, 68 Atl. 622, 14 L. R. A. (N. S.) 937, 125 Am. St. Rep. 759.

See, also, *Sewall v. Robbins*, 139 Mass. 164, 29 N. E. 650.

⁸⁹ 1 Jar. Wills, 134; *Cleobury v. Beckett*, 14 Beav. 588; *Brown v. Thorn-dike*, 15 Pick. (Mass.) 388; *Ray v. Walton*, 2 A. K. Marsh. (Ky.) 71.

⁹⁰ *Lyon v. Dada*, 127 Mich. 395, 86 N. W. 946.

⁹¹ *Smith v. McChesney*, 15 N. J. Eq. 359; *Coffin v. Otis*, 52 Mass. (11 Metc.) 156.

⁹² *Gelbke v. Gelbke*, 88 Ala. 427, 6 South. 834; *Watt's Estate*, 168 Pa. 422, 32 Atl. 42.

So when a will making the testatrix's illegitimate son her universal legatee was followed by another, containing a printed revoking clause, bequeathing a part of her furniture to her sister, and it appeared that the revoking clause was not read over to the testatrix, though the rest of the will was, and there was no evidence to show that she knew of such clause, the second will was probated as a codicil of the first, omitting the clause of revocation. *Goods of Moore* (1892) Prob. 378. Accord: *In re Purdy's Will* (Sur.) 20 N. Y. Supp. 307 (though here the testator was aware of the presence of the printed revoking clause). So, where the printed revoking clause of the second will was struck through with a pencil, both instruments were probated. *Goods of Tonge*, 66 Law T. (N. S.) 60.

mer instrument revokes the latter as to those parts only wherein they are inconsistent.⁹³ In such cases both instruments are probated, as making together the whole will of the testator.⁹⁴

A duly executed later will disposing of testator's entire estate is a revocation of an earlier will.⁹⁵ But the courts incline to hold against revocation when such a holding would result in partial intestacy, and, where the second will disposes only of a part of the property, it will not wholly revoke the previous will, though it is described as his "last will."⁹⁶

Much the same rule applies to codicils as to subsequent wills, though, inasmuch as the former are ordinarily made with a view to the partial modification of the will, rather than to its revocation, and they are regarded as parts of the will, rather than as separate instruments, the rule that all parts of an instrument shall be construed so as to give effect to each, if possible, is applied; and the terms of the codicil are given effect as revoking the will either in whole or in part only when such is the plain intent of the instrument.⁹⁷ Thus, where a will contained a bequest of 500 shares of

⁹³ *Williams v. Miles*, 68 Neb. 463, 94 N. W. 705, 96 N. W. 151, 62 L. R. A. 383, 110 Am. St. Rep. 431, 4 Ann. Cas. 306; *Lemage v. Goodban*, L. R. 1 P. & D. 57, citing 1 Wms. Ex'rs, 199; *Freeman v. Freeman*, 5 De G., M. & G. 704; *Floyd v. Floyd*, 7 B. Mon. (Ky.) 290; *Succession of Bobb*, 42 La. Ann. 40, 7 South. 60; *Johns Hopkins University v. Pinckney*, 55 Md. 365; *McGehee v. McGehee*, 74 Miss. 386, 21 South. 2; *Laughton v. Atkins*, 1 Pick. (Mass.) 535; *Lane v. Hill*, 68 N. H. 275, 44 Atl. 393, 73 Am. St. Rep. 591; *Brant v. Wilson*, 8 Cow. (N. Y.) 56; *In re Baby*, 1 Con. Sur. 317, 4 N. Y. Supp. 182; *Fleming v. Fleming*, 63 N. C. 209; *Price v. Maxwell*, 28 Pa. 23; *Holley v. Larrabee*, 28 Vt. 274.

⁹⁴ *Knox v. Knox*, 95 Ala. 495, 11 South. 125, 36 Am. St. Rep. 235; *Nelson's Estate*, 9 Pa. Co. Ct. R. 552.

⁹⁵ *Schillinger v. Bawek* (1907) 135 Iowa, 131, 112 N. W. 210; *Gilman's Estate*, 65 Misc. Rep. 409, 121 N. Y. Supp. 909.

⁹⁶ *SIMPSON v. FOXON* (1907) Prob. 54, *Dunmore Cas. Wills*, 147; *Lemage v. Goodban*, L. R. 1 P. & D. 57, citing *Cutto v. Gilbert*, 9 Moore, P. C. 131, and *Stoddart v. Grant*, 1 Macq. H. L. 171, which the court regards as overruling *Plenty v. West*, 1 Robert. 204, 9 Jur. 458; *Gordon v. Whitlock*, 92 Va. 723, 24 S. E. 342.

⁹⁷ *Vestal v. Garrett*, 197 Ill. 398, 64 N. E. 345; *Gelbke v. Gelbke*, 88 Ala. 427, 6 South. 834; *Bringhurst v. Orth*, 7 Del. Ch. 178, 44 Atl. 783; *Govan v. Wiley*, 15 App. D. C. 233; *Terhune v. Commercial Nat. Safe Deposit Co.*, 245 Ill. 622, 92 N. E. 532; *Thomas v. Levering*, 73 Md. 451, 21 Atl. 307, 23 Atl. 3; *Halsey v. Episcopal Church*, 75 Md. 275, 23 Atl. 781; *Chapin v. Parker*, 157 Mass. 63, 31 N. E. 713; *In re Willets*, 112 N. Y. 289, 665, 19 N. E. 690; *Griggs v. Griggs*, 80 App. Div. 339, 80 N. Y. Supp. 724; *Viele v. Keeler*, 129 N. Y. 190, 29 N. E. 78, reversing 59 Hun, 617, 13 N. Y. Supp. 196; *In re Van Beuren's Estate* (Sur.) 13 N. Y. Supp. 261; *Rhyne v. Torrence*, 109 N. C. 652, 14 S. E. 95; *In re Manner's Estate*, 22 Pa. Co. Ct. R. 577; *In re Watt's Estate*, 168 Pa. 422, 32 Atl. 42; *In re Leonard's Estate*, 10 Pa. Co. Ct. R. 437.

stock to the testator's brother for life, together with a ratable portion of the residue of such stock, and by codicil the testator "revoked and canceled, for reasons growing out of his late unbrotherly conduct towards me, the legacy of 500 shares of stock * * * given in the aforesaid will," the codicil was held not to affect the brother's interest in the residuary stock.⁹⁸ But the whole question is one of intent, and, that appearing, a will may be revoked in whole or in part as well by a codicil as in any other method.⁹⁹ A principle much quoted in this connection is that, when the will contains a clear and unambiguous disposition of property, such a gift will not be revoked by doubtful expressions in a codicil.¹

If two inconsistent wills be found, of the same date, or without any date, and there is no evidence as to the time of execution of either, both are void, by reason of uncertainty as to which is the will of the testator.² But if any consistent testamentary scheme can be gathered from them both, this will be done.³ The execution of a duplicate containing a revocation clause precisely like its prototype has no effect upon the validity of the latter.⁴ And the execution of a will, the testator supposing it to be an exact copy of an earlier one, but where certain essentials are omitted, does not effect

⁹⁸ *Colt v. Colt* (C. C.) 48 Fed. 385.

⁹⁹ See *Kelly v. Richardson*, 100 Ala. 584, 13 South. 785 (where the will gave to M. all testator's personal property, except certain specific articles which were given to H. and B., and the codicil gave to M. all testator's personal property, except a stock of merchandise, which it gave to C., and the legacies to H. and B. were held thereby revoked); *In re Soher*, 78 Cal. 477, 21 Pac. 8; *Blakeman v. Sears*, 74 Conn. 516, 51 Atl. 517; *Giddings v. Giddings*, 65 Conn. 149, 32 Atl. 334, 48 Am. St. Rep. 192; *Sturgis v. Work*, 122 Ind. 134, 22 N. E. 996, 17 Am. St. Rep. 349 (where the will made two sons of the testator residuary legatees, and the codicil which revoked and changed certain devises of the will, but which made no new specific devises, gave to all his children the residue of the estate not therein specifically devised, and all the children took as residuary legatees, under the codicil); *Newcomb v. Webster*, 113 N. Y. 191, 21 N. E. 77 (where the codicil made a new disposition of all the testator's property, revoking all portions of the will inconsistent therewith); *Ross v. Gleason*, 115 N. Y. 664, 22 N. E. 348; *Hard v. Davison*, 53 Hun, 112, 6 N. Y. Supp. 69; *Bradhurst v. Field*, 59 Hun, 621, 13 N. Y. Supp. 60; *Jackson v. Shinnick*, 6 Ohio Dec. 37; *In re Richard's Estate*, 4 Pa. Dist. R. 264, 36 Wkly. Notes Cas. 264; *Home for Incurables v. Noble*, 172 U. S. 383, 19 Sup. Ct. 226, 43 L. Ed. 486; *Goods of Carritt*, 66 Law T. (N. S.) 379; *Law v. Acton* (Can.) 14 Man. R. 246; *Read v. Backhouse*, 2 R. & My. 546.

¹ *Dominici's Estate* (1907) 151 Cal. 181, 90 Pac. 448; 1 Jar. Wills, 145; *Johns Hopkins University v. Pinckney*, 55 Md. 365; *Lovering v. Balch*, 210 Mass. 105, 96 N. E. 142; *Joiner v. Joiner*, 55 N. C. 68; *Goblet v. Beechey*, 3 Sim. 24; *Gordon v. Hoffman*, 7 Sim. 29; *Bunny v. Bunny*, 3 Beav. 109.

² 1 Wms. Ex'rs, 203; *Phipps v. Anglesea*, 7 Bro. P. C. 43.

³ 1 Wms. Ex'rs, 203; 1 Jar. Wills, 175.

⁴ *Odenwaelder v. Schorr*, 8 Mo. App. 458.

a revocation of the prior will as to such parts, but both instruments are entitled to probate.⁶

Subsequent Will Lost

There is no presumption, from the fact that a second will was made, that it either, in terms, revokes or is inconsistent with the prior will.⁶ Hence, when a will which cannot be found is relied upon as revoking an earlier will, satisfactory proof must be made that such will was properly executed, and that its tenor was such as to effect the revocation claimed for it.⁷

Effect of Revocation of Revoking Will upon Prior Will

The question as to the effect of the revocation of a second will upon a prior will with which it was inconsistent has been much mooted, and the difference of opinion is marked and not wholly explicable. At common law the rule seems to have been that, upon the destruction of the second will, the first "revived," regardless of the intention of the testator, providing he had kept his first will undestroyed and uncanceled.⁸ But the rule in the ecclesiastical courts was that it was to be regarded as a question of intention, to be collected from all the circumstances of the case, and that the legal presumption was neither adverse to, nor in favor of, the revival of a former uncanceled will upon the cancellation of a later revocatory will. The matter was open to a decision either way,

⁶ *Birks v. Birks*, 34 L. J. 90.

⁶ 1 Wms. Ex'rs, 201; *Hitchins v. Bassett*, 3 Mod. 203; *Dunahugh's Will*, 130 Iowa, 692, 107 N. W. 925; *In re Sternberg's Estate*, 94 Iowa, 305, 62 N. W. 734; *Nelson v. McGiffert*, 3 Barb. Ch. (N. Y.) 158, 49 Am. Dec. 170; *Hylton v. Hylton*, 1 Grat. (Va.) 161. And see *Cheever v. North*, 106 Mich. 390, 64 N. W. 455, 37 L. R. A. 561, 58 Am. St. Rep. 499.

Where the later will has been destroyed or is withheld by the proponents of an earlier will, there is a presumption that the later will contained words of revocation. *Jones v. Murphy*, 8 Watts & S. (Pa.) 275, 301.

⁷ *McKenna v. McMichael*, 189 Pa. 440, 42 Atl. 14; *West v. West*, 144 Mo. 119, 46 S. W. 139; *Hylton v. Hylton*, 1 Grat. (Va.) 161; *Goodright v. Harwood*, Cowp. 87; *Hellier v. Hellier*, L. R. 9 P. D. 237; *Cunnion's Will*, 201 N. Y. 123, 94 N. E. 648, Ann. Cas. 1912A, 834; *In re Williams' Will*, 34 Misc. Rep. 748, 70 N. Y. Supp. 1055. In Alabama, a will legally executed revokes a prior will without any proof of the contents of the subsequent will. *Bruce v. Sierra*, 175 Ala. 517, 57 South. 709, Ann. Cas. 1914D, 125.

⁸ *Goodright v. Glazier*, 4 Burr. 2512 (it did not appear whether the second will contained a revoking clause or not); *Harwood v. Goodright*, 1 Cowp. 91 (in which Lord Mansfield said that "if a testator makes one will, and does not destroy it, though he makes another at any time, virtually or expressly revoking the former, if he afterwards destroy the revocation the first will is still in force and good"). See *James v. Marvin*, 3 Conn. 576; *Bohanon v. Walcott*, 1 How. (Miss.) 336, 29 Am. Dec. 631; *Taylor v. Taylor*, 2 Nott & McC. (S. C.) 482; *Lively v. Harwell*, 29 Ga. 509.

solely according to facts and circumstances.⁹ The question was settled in England by statute,¹⁰ under which it has been steadily held that after the execution of a subsequent will containing a revoking clause, or provisions inconsistent with those of a prior will, such former will cannot be revived by the simple cancellation or destruction of the later will.¹¹

In the United States, in the absence of legislation, the influence of the differing points of view of the common law and the ecclesiastical courts is abundantly manifest. When the second will contains no revoking clause, there is strong authority for the view, which seems correct on principle, that its destruction "revives" a prior uncanceled will.¹² These cases go upon the ground that, while the inconsistent provisions of the second will clearly manifest an intent on the part of the testator to revoke the prior will, yet this intent, being purely testamentary in its character, can have no effect until the death of the testator, and, if the instrument containing it is destroyed before that time, this revocatory intent is, for legal purposes, as though it had never been, and the first will, being uncanceled, takes effect.¹³

Where the second will contains a revoking clause, there is a line of cases holding that the destruction of such a will is followed by the same result as attends the destruction of a second inconsistent will, without such clause, and for the same reason.¹⁴ This view, it

⁹ 1 Wms. Ex'rs, 215.

¹⁰ 1 Vict. c. 26, § 22 (1837), enacting that no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed as required by the act, and showing an intention to revive the same.

¹¹ Schouler, Wills, § 414; *Major v. Williams*, 3 Curt. 432; *Brown v. Brown*, 8 El. & Bl. 876; *Dickinson v. Swatman*, 30 L. J. (N. S.) 84; *Wood v. Wood*, L. R. 1 P. & D. 309.

¹² *Cheever v. North*, 106 Mich. 390, 64 N. W. 455, 37 L. R. A. 561, 58 Am. St. Rep. 499; *Peck's Appeal*, 50 Conn. 562, 47 Am. Rep. 685; *Knox v. Knox*, 95 Ala. 495, 11 South. 125, 36 Am. St. Rep. 235; *Blackett v. Ziegler* (1911) 153 Iowa, 344, 133 N. W. 901, 37 L. R. A. (N. S.) 29, Ann. Cas. 1913E, 115.

¹³ It is clear that an actual intent of the testator immediately to revoke is not given effect under this view. If a revocation once becomes effective, it is difficult to see how a destruction of the revoking will indicates an intention to revert to an earlier testamentary plan. "The case is this: He had a scheme and abandoned it for another, and thus abandoned the second. All, so far, is clear and satisfactory; but can you go further and say that when he abandoned the last he returned to the first? If these two schemes comprehended all the possible dispositions of his property, then the conclusion would be a logical one that, when he abandoned the one, he returned to the other." *Per curiam* in *Harwell v. Lively*, 30 Ga. 315, 320, 76 Am. Dec. 649.

¹⁴ *Diamant's Estate* (1915) 84 N. J. Eq. 135, 92 Atl. 952; *Randall v. Beatty*, 31 N. J. Eq. 643; *Taylor v. Taylor*, 2 Nott & McC. (S. C.) 482; *Linginfetter v.*

will be observed, is that of Lord Mansfield, and, assuming the revoking clause to be purely testamentary in its character, is convincing.

A third line of cases holds that, where the second will contains a revoking clause, this clause is not testamentary in its character, but operates to revoke the prior will instantaneously upon the execution of the will containing it, as it would do were it so executed as a separate revocatory document, and that the subsequent revocation of the second will, no matter with what intent, can have no effect to revive the former will, which has become a legal nullity.¹⁶ Granting that the revoking clause can thus be severed from the will (and there seems no reason why it may not be), this position is, it is believed, logically unanswerable.

A fourth view is that where the second will contains a revoking clause, in the absence of evidence as to the testator's intention, the prior will will not be revived by the cancellation of the latter, but, upon due proof that by such cancellation there was an intent on his part to "revive" the earlier will, this intent will be effectuated.¹⁶ This is substantially the position of the ecclesiastical courts and is sustained by the greater number of authorities. While it effectuates the intentions of the testator, it apparently does so either in disregard of the fact that a will is wholly inoperative until the testator's death, or of the true nature of a revocatory clause.¹⁷

Linginfetter, Hardin (Ky.) 119; *Stetson v. Stetson*, 200 Ill. 601, 66 N. E. 262, 61 L. R. A. 258; *Bates v. Hacking*, 29 R. I. 1, 68 Atl. 622, 14 L. R. A. (N. S.) 937.

¹⁶ *Lones v. Lones*, 108 Cal. 688, 41 Pac. 771; *Danley v. Jefferson*, 150 Mich. 590, 114 N. W. 470, 121 Am. St. Rep. 640, 12 Ann. Cas. 242; *Hawes v. Nicholas*, 72 Tex. 481, 10 S. W. 558, 2 L. R. A. 863; *In re Noon's Will*, 115 Wis. 299, 91 N. W. 670, 95 Am. St. Rep. 944.

¹⁶ *Blackett v. Ziegler* (1911) 153 Iowa, 344, 133 N. W. 901, 37 L. R. A. (N. S.) 29, Ann. Cas. 1913E, 115; *Pickens v. Davis*, 134 Mass. 252, 256, 45 Am. Rep. 322; *Chaplin, Wills*, 370; *Williams v. Williams*, 142 Mass. 515, 517, 8 N. E. 424; *Williams v. Miles*, 68 Neb. 463, 94 N. W. 705, 96 N. W. 151, 62 L. R. A. 383, 110 Am. St. Rep. 431, 4 Ann. Cas. 306; *Lane v. Hill*, 68 N. H. 275, 44 Atl. 393, 73 Am. St. Rep. 591; *Moore's Will* (1907) 72 N. J. Eq. 371, 65 Atl. 447 (limiting *Randall v. Beatty*, supra, to cases where circumstances indicate intent to revive); *In re Gould's Will*, 72 Vt. 316, 47 Atl. 1082.

¹⁷ It is peculiarly hard to understand the logic of *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322, the leading case which supports this view, though the actual decision is satisfactory. The court clearly demonstrates that the destruction of a second will indicates, of itself, no intention to revert to an earlier testamentary scheme, and fully indorses the doctrine that a revocatory clause is not necessarily testamentary in its character. This being true, it is difficult to perceive any intermediate ground that can logically be taken between the second and third doctrines, as stated in the text. The revoking clause is either testamentary or it is not. If the former, it can have no effect until the testator's death, and, if the will containing it be destroyed before

To obviate the uncertainty prevailing in this matter, statutes of various sorts have been enacted, some following substantially the English legislation,¹⁸ and others providing that the destruction of a second will shall not revive the first unless it appears by the terms of the revocation that it was the testator's intent to revive the former will.¹⁹ Statutes of the latter class clearly refer only to a revocation in writing and, to revive a former will under such statutes, there must be either a republication of the former will before the witnesses to the original execution or a writing, executed with the same formalities as a will, in which testator expressly declares his intention to revive his former will.²⁰

Revocation Made under Mistake

Where a testator revokes by will a devise or bequest in a previous will, expressly grounding such revocation on the assumption of a fact which turns out to be false, the revocation does not take effect; it being considered conditional, and dependent upon a contingency which fails.²¹ Thus, where a testator revoked certain legacies to grandchildren, "they being all dead," when in fact they were alive, the legacies were treated as not revoked.²² The fact with regard to which the mistake was made must, however, appear upon

that time, the clause is wholly ineffectual for any purpose. If not testamentary in its character, it is submitted that it must be immediately revocative in its character. Say the court in *Pickens v. Davis*, supra: "It is more natural and reasonable to assume that such revocatory clause shows emphatically and conclusively that he has abandoned his former intentions, and substituted therefor a new disposition of his property." But must we not go further, and say that not only does such clause show an abandonment of former intention, but also that it absolutely revokes the instrument in which that intention was embodied? This clause is something more than mere evidence of intention. By virtue of that change of intention, it works, under the statute, an absolute revocation of the prior will as completely as its physical destruction would do. That being the case, a mere revocation of the revoking document cannot give life to the former will. Nothing short of re-execution can do that.

¹⁸ See ante, p. 242.

¹⁹ New York: 2 Rev. St. (1st Ed.) p. 66, pt. 2, c. 6, tit. 1, § 53 (Birdseye's Ed. p. 4022, § 21), construed in *Re Forbes' Will* (Sur.) 24 N. Y. Supp. 841; In *re Brewster's Will*, 72 App. Div. 587, 76 N. Y. Supp. 283; In *re Stickney's Will*, 31 App. Div. 382, 52 N. Y. Supp. 929; In *re Barnes' Will*, 70 App. Div. 523, 75 N. Y. Supp. 373.

Indiana: Burns' Rev. St. 1894, § 2729, construed in *Kern v. Kern*, 154 Ind. 29, 55 N. E. 1004.

²⁰ In *re Stickney's Will*, 161 N. Y. 42, 55 N. E. 396, 76 Am. St. Rep. 246.

²¹ Jar. Wills, 147; *Mendinhall's Appeal*, 124 Pa. 387, 16 Atl. 881, 10 Am. St. Rep. 590.

²² *Gampbell v. French*, 8 Ves. 321; *Doe dem. Evans v. Evans*, 2 Per. & D. 378 (semble).

the face of the instrument.²³ And if the legacy or the revocation be made dependent merely upon information received by the testator, or his belief or opinion, the will or revocation is valid, although the testator may have been misinformed, or may have formed his belief under a misapprehension.²⁴ Whether, on principle, this distinction is sound, may be doubted.

Where the facts alleged by the testator are peculiarly within his knowledge, the revocation is absolute whether his allegations are true or false. Thus, revocations were held to be absolute where revoking instruments declared, as a reason for revocation and contrary to the actual facts, that certain property had been sold,²⁵ that testator had given the former beneficiary certain property,²⁶ or that he had provided the legatee with a permanent home.²⁷

Dependent Relative Revocation

This doctrine is recognized as applying fully to a revocation by a subsequent instrument. Thus, where a will is destroyed with the sole intention of thereby effectuating a prior will, and such destruction does not, under a statute, have this effect, the destruction of the second will is regarded as conditional on the prior will's thereby coming into effect; and, this condition failing, the destruction of the second will is inoperative, and, upon proof of its contents, probate may be had.²⁸

So, where a second will revoked a first will, containing, among other things, an appointment of certain funds, comprised in a settlement made on his first marriage, among the issue of such marriage, the testator being under the erroneous impression that the settlement, by its own force, would give the property to such issue, and that the prior will was therefore useless, and really intending to

²³ *Gifford v. Dyer*, 2 R. I. 99, 57 Am. Dec. 708; *Skipwith v. Cabell's Ex'r*, 19 Grat. (Va.) 758. See, also, *Dunham v. Averill*, 45 Conn. 61, 29 Am. Rep. 642.

So a will containing a revoking clause, of which the testatrix was aware, cannot be avoided, as to such clause, by showing that it was allowed to remain in the will under a misapprehension, the fact regarding which such misapprehension existed not appearing on the face of the will. *Collins v. Elstone*, 1 Rep. 458 (1893) Prob. 1.

²⁴ 1 Redf. 358, cited and followed in *Skipwith v. Cabell's Ex'r*, 19 Grat. (Va.) 758 (where a testatrix, acting upon a belief that the Sequestration Acts might have a certain operation, revoked certain bequests). And see *Attorney General v. Lloyd*, 3 Atk. 553, 10 Ad. & El. 228; *Willett v. Sandford*, 1 Ves. 178, 186.

²⁵ *Giddings v. Giddings*, 65 Conn. 149, 32 Atl. 334, 48 Am. St. Rep. 192.

²⁶ *Mendinhall's Appeal*, 124 Pa. 387, 16 Atl. 881, 10 Am. St. Rep. 590.

²⁷ *Hayes v. Hayes*, 21 N. J. Eq. 265.

²⁸ *Cossey v. Cossey*, 82 Law T. (N. S.) 203, 64 J. P. 89; *Powell v. Powell*, L. R. 1 P. & D. 209.

benefit such issue to the extent that they were beneficiaries under the earlier will, the case was one of dependent relative revocation, and the first will was admitted to probate.²⁹ So a codicil, void as offending the statute against perpetuities,³⁰ or a statute against accumulations,³¹ by virtue of the same doctrine, does not effect a revocation of those portions of the will which it ostensibly and in terms revokes.

And a revocation may be, in terms, conditional, as where a codicil revoked the first of two wills on condition that the testator should die after a certain date, providing, however, that the second should be revoked and the first treated as operative in event of his death before that date.³²

Revocation by Subsequent Conveyance

By the common law, alterations in the estate of the testator were followed by consequences which have largely been abrogated by statute both in England and in the United States.³³ By 1 Vict. c. 26,³⁴

²⁹ *Stamford v. White*, 70 Law J. Prob. 9, (1901) Prob. 46, 84 Law T. 269.

³⁰ *Altrock v. Vandenburg* (Sup.) 25 N. Y. Supp. 851.

³¹ *In re Lutz's Estate*, 9 Pa. Co. Ct. R. 294.

Where, however, testator by a codicil revoked a bequest in his will to carry out a bequest to a charity, the revocation was effective, although the charitable bequest failed because testator died within thirty days after execution of codicil. *Melville's Estate*, 245 Pa. 318, 91 Atl. 679.

³² *Bradish v. McClellan*, 100 Pa. 607; *In re Hamilton's Estate*, 74 Pa. 69.

³³ As the common law has thus been rendered largely obsolete, it may be summarized adequately in this note: "At common law, it was essential to the validity of a devise of freehold lands that the testator should be seised thereof at the making of the will, and that he should continue so seised, without interruption, until his decease. If, therefore, the testator, subsequent to his will, aliened lands which he had disposed of by such will, and afterwards acquired a new freehold estate in the same lands, such newly acquired estate did not pass by the devise, which was necessarily void." 1 Jar. Wills, 128. And the same doctrine is applied to equitable estates, the devise of such an interest being subject to revocation by a conveyance similar to that which would have revoked a devise at law. *Id.*

There were, however, two common-law exceptions to this rule. Both at law and equity, a partition between tenants in common and coparceners was not such a change in the estate of the deviser as would defeat the devise. *Luther v. Kidby*, 3 P. Wms. 169, note; *Risley v. Baltinglass*, T. Raym. 240; *Barton v. Croxall*, Tamlyn, 164; *Attorney General v. Vigor*, 8 Ves. 256, 261; *Ward v. Moore*, 4 Madd. 368; *Rawlins v. Burgess*, 2 Ves. & B. 382; *Walton v. Walton*, 7 Johns. Ch. (N. Y.) 267, 11 Am. Dec. 456; *Ashburner v. Macguire*, 2 Br. C. C. 108; *Basan v. Brandon*, 8 Sim. 171. If, in the partition, the testator becomes seised of the whole estate in severalty, it will not revoke the devise, but the additional title acquired does not pass under the will. *Duffel's Lessee v. Burton*, 4 Har. (Del.) 290. Also, in equity, a will was only partially

³⁴ Section 23 (1837).

it is provided that no conveyance of real estate made after the execution of a will, or other act in relation to such estate, shall prevent the operation of the will upon such portion of the estate as the testator may have power to dispose of at his death; and similar legislation has been generally enacted in the United States, or its principles adopted on the ground of their reasonableness and conformity to the probable intent of the testator.³⁵ Absolute alienation of the property, both at common law and under modern statutes, defeats the will, to the extent that the conveyance operates upon the subject-matter of the will.³⁶ And such alienation defeats the will,

revoked by a subsequent mortgage of the devised land. *Hall v. Dench*, 1 Vern. 329, 352; *Perkins v. Walker*, Id. 97.

So where the testator contracts for an estate, and after going into possession, with sufficient part performance to take the case out of the statute of frauds, devises the same, and subsequently accepts a conveyance, precisely according to the contract, the will will take effect; otherwise, if the estate conveyed be different in any essential particular from that provided for in the contract. 1 Redf. Wills, 335.

In all cases where the estate was varied in any essential particular by the testator, as by a conveyance in fee reserving a ground rent (*Mullock v. Souder*, 5 Watts & S. [Pa.] 198), or a conveyance of the equitable estate retaining the legal title (*Curre v. Bowyer*, 5 Beav. 6), the devise was defeated, although no such effect was anticipated or intended. See, also, *Ward v. Moore*, 4 Madd. 368; *Bullin v. Fletcher*, 1 Keen, 369. But the leasing of a term for years out of the fee did not work a revocation. *Lamb v. Parker*, 2 Vern. Ch. 495.

A change of title to the legal estate did not affect a devise of the beneficial interest. *Parsons v. Freeman*, 3 Atk. 749. So an assignment in trust for the benefit of creditors did not defeat the assignor's will as to such portions of the property as remained after the purpose of the conveyance had been effected. See *Vernon v. Jones*, 2 Freem. 117.

³⁵ 1 Redf. Wills, 334. These statutes, however, differ largely in minute details, and decisions in one jurisdiction have little significance in another, unless the statutes involved are substantially identical. It is, however, safe to say that the common-law rule that a will could not operate upon subsequently acquired lands has been changed throughout the United States, and that the question is now one of testamentary intent, with regard to whose manifestation, however, the statutes vary somewhat. See 1 Jar. Wills (Big. Ed.) 129, note 1; *Gregg v. McMillan*, 54 S. O. 378, 32 S. E. 447.

³⁶ *Phillippe v. Clevenger*, 239 Ill. 117, 87 N. E. 858, 16 Ann. Cas. 207; *In re Sprague's Estate*, 125 Mich. 357, 84 N. W. 293; *Lansing v. Haynes*, 95 Mich. 18, 54 N. W. 699, 35 Am. St. Rep. 545. *Emery v. Society*, 79 Me. 334, 9 Atl. 891; *Jacob v. Jacob*, 82 Law T. (N. S.) 270; *Herrington v. Budd*, 5 Denio (N. Y.) 321; *In re Forney's Estate*, 161 Pa. 209, 28 Atl. 1086; 1 Redf. Wills, 336.

So a devise of property in trust for the testator's daughters is defeated by the placing of property in the hands of a third party in trust for them, the instrument manifesting an intent to revoke the provisions of the will. *Offutt v. Divine's Ex'r* (Ky.) 53 S. W. 816.

It is common to speak of such an alienation as working a revocation of the will. But while the result is equivalent to that of revocation, no actual revo-

though the deed be not recorded during the life of the testator.³⁷ Delivery, however, is essential, to enable the subsequent deed to defeat the prior devise.³⁸ A conversion by the trustees of trust funds disposed of by the will of the cestui que trust into real estate, title to which was taken in the name of the cestui, will not defeat the will, and the legatee is entitled to an equitable lien upon the property to the amount of the fund.³⁹ It is sometimes provided by statute that an executory agreement for the sale of land shall not defeat a prior will, but that such land shall pass to the devisee subject to a right of specific performance,⁴⁰ or that such a contract shall not revoke a devise unless the whole of the purchase money has been paid.⁴¹

An exercise of a power of appointment by will will be defeated by a subsequent exercise of a power of appointment regarding the same fund by deed.⁴²

A frequent statutory provision is that an alteration in the testator's interest in the property devised, not amounting to an entire divestiture, shall not revoke a prior will, unless the conveyance declares such alteration to be a revocation, or is itself wholly inconsistent with the previous devise.⁴³ A will revoked by a conveyance of this character properly executed is not effective as to after-acquired property.⁴⁴

The effect of an invalid deed upon a prior devise of the same subject-matter depends upon the language of the statute.⁴⁵ At common law, the English courts, construing the statute of frauds, held that any attempt to convey the estate devised, which showed a clear intent to revoke, should have that effect, though the deed failed through the incapacity of the grantee, or from want of some

cation is effected. The will remains unaltered. Its complete or partial operation may be defeated, however, by the lack of a subject-matter upon which to operate. If, therefore, property devised and later alienated is subsequently acquired by the testator, it passes under the original will. *Ridenour v. Callahan*, 29 Ohio Cir. Ct. R. 65. See, however, *Phillippe v. Clevenger*, 239 Ill. 117, 87 N. E. 858, 16 Ann. Cas. 207.

³⁷ *Collup v. Smith*, 89 Va. 258, 15 S. E. 584.

³⁸ *Leach v. Burr*, 17 App. D. C. 128.

³⁹ *Clements v. Horn*, 44 N. J. Eq. 595, 18 Atl. 71.

⁴⁰ See Prob. Prac. Act Mont. §§ 461, 463, construed in *Chadwick v. Tatem*, 9 Mont. 354, 23 Pac. 729.

⁴¹ Code Ala. 1876, § 2287, construed in *Slaughter v. Stephens*, 81 Ala. 418, 2 South. 145.

⁴² *Paine v. Forsaith*, 86 Me. 357, 30 Atl. 11.

⁴³ 2 Rev. St. N. Y. (1st Ed.) p. 65, pt. 2, c. 6, tit. 1, §§ 47, 48, is a typical statute of this sort. See *Saville v. Steer*, 60 Hun, 576, 14 N. Y. Supp. 398; *Burnham v. Comfort*, 108 N. Y. 535, 15 N. E. 710, 2 Am. St. Rep. 462.

⁴⁴ *In re Backus' Will*, 49 App. Div. 410, 63 N. Y. Supp. 544.

⁴⁵ See *Bennett v. Gaddis*, 79 Ind. 347.

indispensable ceremony, such as livery of seisin in the case of a feoffment.⁴⁶ But a deed of one under disability, as that of a married woman, did not operate to revoke a devise.⁴⁷ And a deed executed for an immoral consideration has been held not to revoke a devise of the same land.⁴⁸

A deed adjudged invalid because procured by fraud and undue influence of the grantee does not work a revocation of a prior will disposing of the same land,⁴⁹ and a deed by an insane person to one with knowledge of grantor's incapacity does not revoke a valid will previously made by the grantor.⁵⁰

REVOCATION BY CHANGE OF CIRCUMSTANCES

87. At common law, the will of a woman was revoked by her subsequent marriage; that of a man, by marriage and the birth of issue. Neither of these events, alone, affected his will.

88. In many jurisdictions, statutes have materially modified the common law in these respects.

Marriage, at common law, worked an absolute revocation of a woman's will,⁵¹ and such is still the rule in the absence of legislation to the contrary; and the subsequent restoration of her testamentary capacity by her surviving her husband does not revive the will.⁵² Marriage produced this effect for a twofold reason: It destroyed testamentary capacity;⁵³ and to have regarded the will as still valid would have given it an unchangeable character

⁴⁶ 1 Redf. Wills, 343. See *Shove v. Pincke*, 5 T. R. 124; *Vawser v. Jeffrey*, 2 Swanst. 274.

⁴⁷ *Ellbeck v. Wood*, 1 Russ. 564.

⁴⁸ *Ford v. De Pontès*, 30 Beav. 572.

⁴⁹ *Graham v. Burch*, 47 Minn. 171, 49 N. W. 697, 28 Am. St. Rep. 339.

⁵⁰ *Bethany Hospital Co. v. Philippi*, 82 Kan. 64, 107 Pac. 530, 30 L. R. A. (N. S.) 194.

⁵¹ 1 Jar. Wills, 110; *Smith v. Clemson*, 6 Houst. (Del.) 171; *Crum v. Sawyer*, 132 Ill. 443, 24 N. E. 956; *Colcord v. Conroy*, 40 Fla. 97, 23 South, 561; *Nutt v. Norton*, 142 Mass. 242, 245, 7 N. E. 720; *Blodgett v. Moore*, 141 Mass. 75, 5 N. E. 470; *Swan v. Hammond*, 138 Mass. 45, 52 Am. Rep. 255; *Vandever v. Higgins*, 59 Neb. 333, 80 N. W. 1043; *Fidelity Ins., Trust & Safe Deposit Co's Appeal*, 121 Pa. 1, 15 Atl. 484; *Morton v. Onion*, 45 Vt. 145; *In re Ward's Will*, 70 Wis. 251, 35 N. W. 731, 5 Am. St. Rep. 174.

⁵² *Forse and Hembling's Case*, 4 Rep. 61; *Cotter v. Laver*, 2 P. Wms. 624; *Doe v. Staple*, 2 T. R. 695; *Hodsden v. Lloyd*, 2 Bro. Ch. 533; *Long v. Aldred*, 3 Add. 48; *Brown v. Clark*, 77 N. Y. 369.

⁵³ See ante, p. 80.

during the existence of coverture, which was inconsistent with the inherently ambulatory character of a will.⁵⁴ Furthermore, the absolute title which the husband acquired to the wife's personal property, together with his control over and interest in her realty, was inconsistent with even the potential operation of a will made before marriage. But a will made by a woman before marriage, and operating as an appointment under a power, was not necessarily revoked by her marriage;⁵⁵ nor was a will so operating and made during coverture revoked by the death of the husband.⁵⁶

Marriage, of itself, worked no such effect upon the will of a man, for neither of these considerations prevailed in his case.⁵⁷ But it was held from an early date that his marriage, coupled with the birth of issue, would have that result.⁵⁸ This doctrine was said to rest upon a presumed change of testamentary intent,⁵⁹ but the truer ground is that of an implied condition against the operation of the will upon the happening of these events.⁶⁰ For a mere intention to revoke could hardly be given effect unless manifested and carried into execution by some act in pais.⁶¹ And the rule applies as well to wills of realty as of personalty,⁶² though there was some doubt in this regard, owing to the enumeration of the methods of express revocation of wills of realty as set forth in the statute of frauds.⁶³

The birth of a child, alone, did not affect a will made after marriage, since the testator might fairly be presumed to contemplate such an event;⁶⁴ and the fact that the testator left his wife enceinte, without knowing it, did not impart to the birth of a posthumous child any revoking effect.⁶⁵ The presumption that the will of an unmarried testator is conditioned to be inoperative in

⁵⁴ *Emery, Appellant*, 81 Me. 275, 17 Atl. 68.

⁵⁵ 1 Jar. Wills, 110; *Logan v. Bell*, 1 C. B. 872; *Osgood v. Bliss*, 141 Mass. 474, 6 N. E. 527, 55 Am. Rep. 488.

⁵⁶ 1 Jar. Wills, 111; *Morwan v. Thompson*, 3 Hagg. 239; *Clough v. Clough*, 3 My. & K. 296.

⁵⁷ *Swan v. Hammond*, 138 Mass. 45, 52 Am. Rep. 255; *In re Adler's Estate*, 52 Wash. 539, 100 Pac. 1019.

⁵⁸ *Overbury v. Overbury*, 2 Show. 242; *Lugg v. Lugg*, 2 Salk. 592.

⁵⁹ See cases cited in note 141; 1 Jar. Wills, 111.

⁶⁰ *Kenebel v. Scrafton*, 2 East, 530.

⁶¹ *Id.*, by Lord Ellenborough. See, also, *Holtt v. Holtt*, 63 N. H. 498, 3 Atl. 604, 56 Am. Rep. 530; *Marston v. Roe*, 8 Ad. & El. 14.

⁶² *Christopher v. Christopher*, Dick. 445 (a case putting all doubt on the question at rest). See *Kenebel v. Scrafton*, 2 East, 530.

⁶³ See ante, p. 224.

⁶⁴ *Easterlin v. Easterlin* (1911) 62 Fla. 468, 56 South. 688, Ann. Cas. 1913D, 1316.

⁶⁵ 1 Jar. Wills, 111; *Doe v. Barford*, 4 M. & S. 10.

event of marriage and birth of issue cannot be met by parol evidence to show that such was not the case.⁶⁶ So the subsequent death of the child does not revive a will executed prior to the marriage and the birth of the child in question.⁶⁷ But this condition is supposed to exist on the ground that it cannot be presumed that a testator would leave his wife and children unprovided for, and that the contingency of having them would not present itself to an unmarried testator. Hence, when provision is actually made for such wife and children by the will, this condition fails, and the will is not affected by the marriage and their subsequent birth,⁶⁸ as is also the case where the testator, before making his will, or contemporaneously with it, makes express provision, by a separate deed or other instrument, for wife and future issue.⁶⁹ But the existence of the tacit condition regarding the nonoperation of the will in event of marriage and the birth of issue is to be determined by the situation at the time when the will is made, and not at that of the testator's death. Hence the fact that subsequent to the making of the will, and at the time of the marriage, provision is made for the wife and issue by way of settlement, will not prevent a revocation by marriage and subsequent birth of issue.⁷⁰

There is some authority for the view that subsequent marriage and birth of issue will work a revocation of the will only when all the testator's property is disposed of by the will, though it may be doubted if, in principle, this view is correct.⁷¹ Property acquir-

⁶⁶ *Marston v. Roe*, 8 A. & E. 14. Before this decision the law on this point was uncertain, and there were many dicta the other way. See 1 Redf. Wills, 296. The conflict in this regard has affected the American cases. See *Gay v. Gay*, 84 Ala. 38, 4 South. 42; *Warner v. Beach*, 4 Gray (Mass.) 162, 163; *Havens v. Van Den Burgh*, 1 Denio (N. Y.) 27; *Miller v. Phillips*, 9 R. I. 141; *Wheeler v. Wheeler*, 1 R. I. 364.

⁶⁷ *Emerson v. Boville*, 1 Phillim. 342; *Ash v. Ash*, 9 Ohio St. 383.

⁶⁸ *Brown v. Thompson*, 1 Eq. Cas. Ab. 413; *Kenebel v. Scrafton*, 2 East, 530; *Marston v. Roe*, 8 A. & E. 14.

The provision must be for both wife and children. It is not enough to provide for the future wife only. See cases above cited, and 1 Redf. Wills, 297.

⁶⁹ *Kenebel v. Scrafton*, 2 East, 530; *Brady v. Cubitt*, Doug. 31, 39. And see 1 Redf. Wills, 294; 1 Jar. Wills, 111.

⁷⁰ *Israell v. Rodon*, 2 Moore, P. C. 51.

⁷¹ *Brady v. Cubitt*, Doug. 39; *Kenebel v. Scrafton*, 2 East, 541; *Marston v. Roe*, 8 A. & E. 14.

Much that it is said in these cases on this point is by way of dicta, and on principle it may be doubted if the position is sound (see 1 Redf. Wills, 296), particularly where the property undisposed of is wholly inadequate to the needs of wife or child. Assuming the doctrine to depend upon a tacit condition existing at the time the will is made that it shall be non-operative upon marriage and the birth of issue, there seems to be no reason why such condition should not attach to a partial as well as to a total testamentary disposi-

ed by the testator after the execution of his will, and which is unaffected by the will, is not such a provision for after-born children as to prevent a revocation by circumstances.⁷²

Statutory Changes

By 1 Vict. c. 26,⁷³ it was provided that every will made by a man or woman shall be revoked by his or her marriage; and this legislation has been followed to a considerable extent in the United States, with the frequent qualification that marriage shall not have this effect if the will appears to have been made in contemplation of such an event. The word "testator," in such a statute, has been construed as including woman.⁷⁴ A will giving all the testator's property to a certain "single woman," and making her his executrix, does not sufficiently appear to have been made in contemplation of marriage to come within the proviso of such a statute.⁷⁵ Statutes of this kind generally do not apply to marriages occurring prior to their passage.⁷⁶

In the absence of any qualification, marriage, under a statute of this character, works per se a revocation of the will,⁷⁷ which is then void for every purpose.⁷⁸ And such is the result even though the will be made pursuant to an antenuptial contract to that end.⁷⁹

Statutes occasionally provide for the revocation of a will by

tion. For it is wholly unlikely that a portion of the testator's property was left undisposed of, for the benefit of possible subsequent issue, and the very fact that possibilities of this character are presumably absent from the mind of the testator is the reason for raising the condition under consideration.

⁷² *Baldwin v. Spriggs*, 65 Md. 373, 5 Atl. 295. See, also, *In re Rossignot's Will*, 50 Misc. Rep. 231, 100 N. Y. Supp. 623 (where will deemed revoked, although whole estate not disposed of because certain legacies lapsed).

⁷³ Section 18 (1837).

⁷⁴ *Ellis v. Darden*, 86 Ga. 368, 12 S. E. 652, 11 L. R. A. 51. The Code, however, provided that "the masculine gender shall include the feminine."

⁷⁵ *Ingersoll v. Hopkins*, 170 Mass. 401, 49 N. E. 623, 40 L. R. A. 191 (refusing to admit parol evidence to show that will was made in contemplation of marriage).

⁷⁶ *Swan v. Sayles*, 165 Mass. 177, 42 N. E. 570.

⁷⁷ *Hudnall v. Ham*, 183 Ill. 486, 56 N. E. 172, 48 L. R. A. 557, 75 Am. St. Rep. 124; *McAnnulty v. McAnnulty*, 120 Ill. 26, 11 N. E. 397, 60 Am. Rep. 552.

The fact that testator made his will in contemplation of marriage and provided therein for his wife did not prevent a revocation where statute contained no qualification. *Francis v. Marsh*, 54 W. Va. 545, 46 S. E. 573, 1 Ann. Cas. 665.

⁷⁸ *Sloniger v. Sloniger*, 161 Ill. 270, 43 N. E. 1111.

⁷⁹ *Stewart v. Powell*, 90 Ky. 511, 14 S. W. 496, 10 L. R. A. 57; *Ransom v. Connelly*, 93 Ky. 63, 18 S. W. 1029.

But where the testator and his wife released all their claims in the estates of each other by an antenuptial contract, it was held that the wife could not appeal from an order admitting the will to record, on the ground of revoca-

the subsequent marriage of the testator and the survival of the wife, unless provision has been made for her by marriage contract. In such cases the marriage contract must purport, on its face, to make provision for the wife in lieu of testamentary provision, and no evidence can be received of the intention of the parties for the purpose of taking a will from the operation of the statute.⁸⁰

The common-law rule that the marriage of a woman works a revocation of her will is occasionally re-enacted by statute,⁸¹ and such statutes are not regarded as repealed by subsequent legislation removing the disabilities of married women, and vesting them with complete control of their property, as though they were sole.⁸² A widow is an "unmarried woman" within the purview of these statutes.⁸³ The probate of a will thus revoked is inoperative, and does not prevent an after-born child from claiming a distributive share in opposition to the will.⁸⁴ So a mutual will of two sisters, by which the survivor would take the whole estate of the two, is revoked by the marriage of one of them regardless of her wishes or intention in the matter.⁸⁵ But when the testamentary incapacity of a married woman is removed by statute, statutes providing for the revocation of wills of unmarried women by marriage are held not to apply to the wills of married women who remarry after widowhood.⁸⁶

Occasionally the common-law respecting the effect of marriage upon the will of an unmarried woman has been, in terms, repealed. And where the common-law disabilities of married women to make wills have been removed, it has generally been held that, the reason of the rule ceasing, the marriage of an unmarried woman should not affect the validity of her will, inasmuch as its ambulatory character still remains.⁸⁷

tion by marriage. *Biggerstaff's Ex'rs v. Biggerstaff's Adm'r*, 95 Ky. 154, 23 S. W. 965.

⁸⁰ *Corker v. Corker*, 87 Cal. 643, 25 Pac. 922.

⁸¹ Lord's Oregon Laws of 1910, § 7322, provides that a will of an unmarried person shall be deemed revoked by a subsequent marriage.

⁸² *In re Booth's Will*, 40 Or. 154, 61 Pac. 1135, 66 Pac. 710; *Brown v. Clark*, 77 N. Y. 369.

⁸³ *Matter of Kaufman*, 131 N. Y. 620, 30 N. E. 242, 15 L. R. A. 292.

⁸⁴ *In re Craft's Estate*, 164 Pa. 520, 30 Atl. 493.

⁸⁵ *Hale v. Hale*, 90 Va. 728, 19 S. E. 739.

⁸⁶ *In re McLarney's Will*, 153 N. Y. 416, 47 N. E. 817, 60 Am. St. Rep. 664; *In re Burton's Will (Sur.)* 4 Misc. Rep. 512, 25 N. Y. Supp. 824; *Chapman v. Dismar*, 14 App. D. C. 446. And see *In re Comassi's Estate*, 107 Cal. 1, 40 Pac. 15, 28 L. R. A. 414.

⁸⁷ *Emery, Appellant*, 81 Me. 275, 17 Atl. 68; *In re Hunt*, 81 Me. 275, 17 Atl. 68; *Kelly v. Stevenson*, 85 Minn. 247, 88 N. W. 739, 56 L. R. A. 754, 89 Am. St. Rep. 545; *Roane v. Hollingshead*, 76 Md. 369, 25 Atl. 307, 17 L. R. A.

While, at common law, as has been seen,⁸⁸ marriage, of itself, did not affect the will of a man, yet, under modern statutes making the wife an heir of the husband, there are some cases to the effect that marriage revokes the testator's will, without the birth of issue.⁸⁹ On principle, and, it is believed, by weight of authority, the contrary view is correct.⁹⁰

Other Statutory Changes

The most significant statutory changes have had regard to the rule that marriage, followed by the birth of issue, absolutely revokes the will. In most jurisdictions the requirement that the will shall precede the marriage has been abolished. A will made after marriage is usually somewhat affected by the subsequent birth of issue. But in a majority of the states the birth of a child does not work the entire revocation of a prior will, but only pro tanto to the extent of the interest which the child would have taken, had there been no will.⁹¹ Other statutes provide that, if the testator have no child living at the time of executing his will, the will shall be deemed revoked by the subsequent birth of issue, unless provision is made for such issue, or an intent not to do so is manifest on the face of the will.⁹² In some jurisdictions, however, the common law in regard to the effect of marriage and the birth of issue remains substantially unaltered.⁹³

Provision Sufficient to Prevent Operation of Statutes

The operation of most statutes of this character is conditioned upon lack of provision for the subsequent issue, or a manifest in-

592, 35 Am. St. Rep. 438; *In re Lyon's Will*, 96 Wis. 339, 71 N. W. 362, 65 Am. St. Rep. 52; *In re Ward's Will*, 70 Wis. 251, 35 N. W. 731, 5 Am. St. Rep. 174. And see *Morey v. Sohler*, 63 N. H. 507, 3 N. E. 636, 56 Am. Rep. 538; *Carey's Estate*, 49 Vt. 236, 24 Am. Rep. 133; *Webb v. Jones*, 36 N. J. Eq. 163; *Noyes v. Southworth*, 55 Mich. 173, 20 N. W. 891, 54 Am. Rep. 359.

⁸⁸ See ante, p. 250.

⁸⁹ *Brown v. Scherrer*, 5 Colo. App. 255, 38 Pac. 427; *Scherrer v. Brown*, 21 Colo. 481, 42 Pac. 668; *Morgan v. Ireland*, 1 Idaho, 786; *Tyler v. Tyler*, 19 Ill. 151; *Teopfer's Estate*, 12 N. M. 372, 78 Pac. 53, 67 L. R. A. 315.

⁹⁰ *Hulett v. Carey*, 66 Minn. 327, 69 N. W. 31, 34 L. R. A. 384, 61 Am. St. Rep. 419; *Hoy v. Hoy* (1909) 93 Miss. 732, 48 South. 903, 25 L. R. A. (N. S.) 182, 136 Am. St. Rep. 5; *Munday's Ex'rs v. Munday*, 8 O. C. D. 44; *Holtt v. Holtt*, 63 N. H. 475, 3 Atl. 604, 56 Am. Rep. 530; *Goodsell's Appeal*, 55 Conn. 171, 10 Atl. 557; *Morgan v. Davenport*, 60 Tex. 230.

⁹¹ Rev. St. Ill. 1881, c. 39, § 10 (Starr & C. Ann. St. 1885, p. 883), construed in *Ward v. Ward*, 120 Ill. 111, 11 N. E. 336, may be taken as typical of this class. And see *Van Wickle v. Van Wickle*, 59 N. J. Eq. 317, 44 Atl. 877.

⁹² Gen. Code Ohio 1910, § 10561, is typical of this class (construed in *Rhodes v. Weldy*, 46 Ohio St. 234, 20 N. E. 461, 15 Am. St. Rep. 584).

⁹³ See *Belton v. Summer*, 31 Fla. 139, 12 South. 371, 21 L. R. A. 146; *Shorten v. Judd*, 60 Kan. 73, 55 Pac. 286; *Glascott v. Bragg*, 111 Wis. 605, 87 N. W. 853, 56 L. R. A. 258.

tent to exclude such issue from the testator's bounty. It is difficult to say what constitutes a provision sufficient to meet the requirements of these statutes. There are authorities to the effect that the provision must consist of a vested interest to take effect in possession upon the death of the testator, and that a remainder or reversion is not enough.⁹⁴ This view has been rejected, however, and any beneficial gift, whether present or future, has been held to be a sufficient provision.⁹⁵ The provision must be of substantial value, unless the giving of a nominal amount clearly manifests an intention to disinherit.⁹⁶

Intentional Omission

Generally statutes providing for a total or partial revocation of the will of a testator upon the subsequent birth of issue for whom no provision is made are conditioned in their operation upon the fact that such exclusion was not intentional. A testator may ordinarily disinherit unborn as well as living children, if such is his clearly manifested desire.⁹⁷ Where the will is silent with regard to such children, some jurisdictions hold that parol evidence, including declarations of the testator, may be received to show that their omission was intentional, and with a view to their disinheritance.⁹⁸ Other courts have held that the testator's intention

⁹⁴ *Waterman v. Hawkins*, 63 Me. 156; *Rhodes v. Weldy*, 46 Ohio St. 234, 20 N. E. 461, 15 Am. St. Rep. 584 (where the devise was to the wife for life, remainder to the heirs of her body); *Bowen v. Hoxie*, 137 Mass. 527.

⁹⁵ *Verrinder v. Winter*, 98 Wis. 287, 73 N. W. 1007; *Rhoton v. Blevin*, 99 Cal. 645, 34 Pac. 513; *Gay v. Gay*, 84 Ala. 38, 4 South. 42 (where an antenuptial contract made by a testator, conveying to his intended wife real and personal property in trust, for her life or widowhood, remainder to any issue of the marriage living at testator's death, was held to constitute a sufficient provision). See, also, *Newlin's Estate*, 209 Pa. 456, 58 Atl. 846, 68 L. R. A. 464.

⁹⁶ *Stebbins v. Stebbins*, 94 Mich. 304, 54 N. W. 159, 34 Am. St. Rep. 345 (where the bequest was of a few books); *Worley v. Taylor*, 21 Or. 589, 28 Pac. 903, 28 Am. St. Rep. 771; *Boman v. Boman*, 49 Fed. 329, 1 C. C. A. 274 (where the gift was one dollar).

⁹⁷ In Ohio, however, where testator has a child living at the time of executing his will, a child born later, for whom no provision is made in the will inherits as if testator had died intestate, notwithstanding that by clear and explicit language in the will testator undertakes to disinherit such after-born child. *German Mutual Insurance Company v. Lushey*, 66 Ohio St. 233, 64 N. E. 120, construing section 10563, Gen. Code 1910.

⁹⁸ *Buckley v. Gerard*, 123 Mass. 8; *Wilson v. Fosket*, 6 Metc. (Mass.) 400, 39 Am. Dec. 736 (construing a statute providing that children shall take unless provided for by the testator in his lifetime, or unless it shall appear that such omission was intentional, and not occasioned by mistake).

See, also, *Lorleux v. Keller*, 5 Iowa, 196, 68 Am. Dec. 696; *Whittemore v. Russell*, 80 Me. 297, 14 Atl. 197, 6 Am. St. Rep. 200; *Miller v. Phillips*, 9 R. I. 141; *Coulam v. Doull*, 133 U. S. 216, 10 Sup. Ct. 253, 33 L. Ed. 956.

must appear on the face of the will, and that extrinsic evidence cannot be received either to prove or disprove its existence.⁹⁹ The question largely turns upon the language of the statutes under construction,¹ but unless the statute expressly requires that intention to omit appear from the will alone, extrinsic evidence should be admitted to show intent.²

Where the intent to exclude must appear in the will, no particular formula need be used to manifest this intent. It must be made to appear in clear terms or by implication.³ A neglect to mention the child at all does not show that the omission was intentional.⁴ While it is sometimes held that a will of all of the testator's property to others than children, without naming the latter, sufficiently manifests an intent to disinherit them,⁵ yet the weight of authority is quite the other way.⁶ While, as a question of abstract logic, the former view is probably correct (for, where a testator, with full knowledge of all the facts, in terms disposes of all his property to a wife, for instance, he must be fully aware that his children take nothing from him, and must intend this consequence), yet it is hardly in accord with the spirit of legislation of this character, whose purpose is to prevent the disinheritance of the children unless the language of the will makes this result inevitable.

Adoption of Child

Whether the adoption of a child is attended with the same consequences as the birth of issue depends wholly upon the language of the statutes respecting revocation of wills and the adoption of children. When an adopted child is given the status of one born in wedlock, for purposes of succession and inheritance, his adop-

⁹⁹ 1 Underhill, Wills, § 243; *In re Stevens' Estate*, 83 Cal. 322, 23 Pac. 379, 17 Am. St. Rep. 252; *Peet v. Peet*, 229 Ill. 341, 82 N. E. 376, 13 L. R. A. (N. S.) 780, 11 Ann. Cas. 492; *Lurie v. Radnitzer*, 166 Ill. 609, 46 N. E. 1116, 57 Am. St. Rep. 157; *CARPENTER v. SNOW*, 117 Mich. 489, 76 N. W. 78, 41 L. R. A. 820, 72 Am. St. Rep. 576, *Dunmore Cas. Wills*, 150; *Thomas v. Black*, 113 Mo. 66, 20 S. W. 657; *Bresee v. Stiles*, 22 Wis. 120.

¹ Statutes sometimes provide, in terms, that no evidence shall be received to rebut the presumption of revocation arising from the birth of a child who is unprovided for by the will, and who is not mentioned so as to show an intention not to provide for him. See Gen. Code Ohio 1910, § 10561.

² Wigmore on Ev. § 2475.

³ *Merrill v. Hayden*, 86 Me. 133, 29 Atl. 949.

⁴ *In re Stevens' Estate*, 83 Cal. 322, 23 Pac. 379, 17 Am. St. Rep. 252; *In Barker's Estate*, 5 Wash. 390, 31 Pac. 976.

⁵ *Hawhe v. C. & W. I. R. R. Co.*, 165 Ill. 561, 46 N. E. 240.

⁶ *Sutton v. Hancock*, 115 Ga. 857, 42 S. E. 214; *Bancroft v. Ives*, 3 Gray (Mass.) 367; *CARPENTER v. SNOW*, 117 Mich. 489, 76 N. W. 78, 41 L. R. A. 820, 72 Am. St. Rep. 576, *Dunmore Cas. Wills*, 150; *Thomas v. Black*, 113 Mo. 66, 20 S. W. 657.

tion has been held to revoke a prior will as effectually as would issue of the marriage.⁷ But the mere creation of the legal relation of parent and child as a result of adoption apparently does not have that effect,⁸ and an adopted child is not "issue," within the purview of a statute providing for the revocation of a will by marriage and birth of issue.⁹

Illegitimate Children

The effect of the birth of illegitimate children upon a prior will depends wholly upon their statutory status. As a rule, if not recognized or in some way rendered legitimate under the statute, their birth subsequent to the execution of the will has no effect, not even upon the will of the mother.¹⁰ If legitimated, under the statute, so as to become an heir, the birth of such child subsequent to the execution of the will has the same effect as that of a legitimate child.¹¹

Where an illegitimate child was born before the execution of a will by its father; a subsequent legitimation of such child by the marriage of its parents was insufficient to avoid the will under a statute which made a will void as to after-born children.¹²

Divorce

Revocation of a previously executed will is not implied by law from the fact that testator obtains a divorce from his wife.¹³ But where the divorce is accompanied by a settlement of the property rights between husband and wife, it is sometimes held that the change of circumstances is sufficient to cause an implied revocation of a prior will,¹⁴ although, on principle, there seems to be no warrant, either because of policy or because of a supposed change of

⁷ *Flannigan v. Howard*, 200 Ill. 396, 65 N. E. 782, 59 L. R. A. 664, 93 Am. St. Rep. 201; *Hilpire v. Claude*, 109 Iowa, 159, 80 N. W. 332, 46 L. R. A. 171, 77 Am. St. Rep. 524; *Glascott v. Bragg*, 111 Wis. 605, 87 N. W. 853, 56 L. R. A. 258.

Contra: *Davis v. Fogle*, 124 Ind. 41, 23 N. E. 860, 7 L. R. A. 485.

⁸ *In re Gregory's Estate* (Sur.) 15 Misc. Rep. 407, 37 N. Y. Supp. 925.

⁹ *In re Comassi's Estate*, 107 Cal. 1, 40 Pac. 15, 28 L. R. A. 414.

¹⁰ *Kent v. Barker*, 2 Gray (Mass.) 535 (where illegitimate child would have taken, had mother died intestate); *In re Bunce*, 6 Dem. Sur. (N. Y.) 278.

¹¹ *Milburn v. Milburn*, 60 Iowa, 411, 14 N. W. 204.

¹² *McCulloch's Appeal*, 113 Pa. 247, 6 Atl. 253.

¹³ *Card v. Alexander*, 48 Conn. 492, 40 Am. Rep. 187; *Baacke v. Bancke*, 50 Neb. 18, 69 N. W. 303; *Charlton v. Miller*, 27 Ohio St. 298, 22 Am. Rep. 307; *IN RE JONES' ESTATE*, 211 Pa. 364, 60 Atl. 915, 69 L. R. A. 940, 107 Am. St. Rep. 581, 3 Ann. Cas. 221, *Dunmore Cas. Wills*, 154.

¹⁴ *Wirth v. Wirth*, 149 Mich. 687, 113 N. W. 306; *Lansing v. Haynes*, 95 Mich. 16, 54 N. W. 699, 35 Am. St. Rep. 545; *In re Hall's Estate*, 106 Minn. 502, 119 N. W. 219, 20 L. R. A. (N. S.) 1073, 130 Am. St. Rep. 621, 16 Ann. Cas. 541; *In re Battis*, 143 Wis. 234, 126 N. W. 9, 139 Am. St. Rep. 1101.

intention, for a court to introduce the doctrine of implied revocation as a matter of law under such circumstances.¹⁵

No Revocation by Other Change of Circumstances

No change in the circumstances of the testator, other than those heretofore discussed, will work an implied revocation of his will. No matter how long a man may live after making his will—even though he should become insane—or how much his wealth may increase or diminish, or what objects of his bounty may die before him, his will, as such, remains unrevoked; and it will operate to the extent that there is subject-matter on which it may act, and beneficiaries alive who may take.¹⁶

A change in the feelings and intentions of the testator cannot operate as a revocation. Thus, a will made to disinherit a child because testator was unfriendly to her is not revoked by the testator becoming reconciled to such child and stating that he wished all his children to share equally.¹⁷

EVIDENCE OF REVOCATION—BURDEN OF PROOF

89. The party who seeks to defeat a will by showing that it has been revoked must establish such revocation by a preponderance of the evidence.

Assuming that proof of execution has been duly made, so that, in the absence of a contest, probate would be allowed, the allegation that the will has been revoked is obviously in the nature of a plea of confession and avoidance, and the burden of establishing it is upon the contestant.¹⁸ When a written revocation is set up, it must be established by the same kind and measure of evidence as are required for the establishment of a will.¹⁹

¹⁵ *In re Brown's Estate*, 139 Iowa, 219, 117 N. W. 260; *Baacke v. Baacke*, *supra*.

¹⁶ See 1 Wms. Ex'rs, 187, 188; *Warner v. Beach*, 4 Gray (Mass.) 162 (holding a will not revoked by implication through lapse of time, increase in the value of the property, and insanity of testator).

¹⁷ *Jones v. Moseley*, 40 Miss. 261, 90 Am. Dec. 327.

¹⁸ *In re Olmsted's Estate*, 122 Cal. 224, 54 Pac. 745; *Webster v. Yorty*, 194 Ill. 408, 62 N. E. 907. See *In re Hammond's Will* (Sur.) 4 N. Y. Supp. 456; *In re Wood*, 2 Con. Sur. 144, 11 N. Y. Supp. 157.

¹⁹ *In re Noyes' Will*, 61 Vt. 14, 17 Atl. 743.

Oral evidence of the contents of the revoking document cannot be received until its destruction is proved, or its absence accounted for. *Minor v. Guthrie* (Ky.) 4 S. W. 179.

Presumption in Aid of Contestant

The contestant is often aided by the presumption of fact that a will which was under the control of the testator during his lifetime, and which cannot be found at his death, was destroyed by him with intent to revoke.²⁰ But the mere presumption of destruction by the testator is readily overcome, as by proof that the testator did not have access to the will after its execution,²¹ or that he never intended revocation and died supposing the will to be in existence,²² or that the testator's feelings towards the beneficiaries never changed, accompanied by proof that the will might have been lost, or destroyed without his knowledge,²³ or that the will was destroyed without the knowledge of the testator.²⁴

So when the testator was insane during a part of the time between the execution of the will and his death, while there is a presumption that it was destroyed by the testator, in whose possession it remained, in event of its not being found, yet there is no presumption as to when it was destroyed, and the party asserting its revocation must show that it was destroyed by the testator during the period of sanity.²⁵

²⁰ *Scott v. Maddox*, 113 Ga. 795, 39 S. E. 500, 84 Am. St. Rep. 263; *Stetson v. Stetson* (1903) 200 Ill. 601, 66 N. E. 262, 61 L. R. A. 258; *Boyle v. Boyle*, 158 Ill. 228, 42 N. E. 140; *Minor v. Guthrie* (Ky.) 4 S. W. 179; *In re Willitt's Estate* (N. J. Prerog.) 46 Atl. 519; *In re Kennedy's Will*, 167 N. Y. 163, 60 N. E. 442; *Hard v. Ashley*, 88 Hun, 103, 34 N. Y. Supp. 583; *Behrens v. Behrens*, 47 Ohio St. 323, 25 N. E. 209, 21 Am. St. Rep. 820; *Gardner v. Gardner*, 177 Pa. 218, 35 Atl. 558; *Deaves' Estate*, 140 Pa. 242, 21 Atl. 395; *Appeal of Clark*, 149 Pa. 111, 24 Atl. 174; *McIntosh v. Moore*, 22 Tex. Civ. App. 22, 53 S. W. 611; *Goods of Radcliffe*, 65 Law T. 165.

²¹ *Schultz v. Schultz*, 35 N. Y. 653, 91 Am. Dec. 88; *Lane v. Hill*, 68 N. H. 275, 44 Atl. 393, 73 Am. St. Rep. 591.

So no presumption of revocation by the testator arises where a will was received by the register of wills, through the mail, more than a year after the death of the testator, and more than twenty-two years after its execution, where the will, when received, is mutilated, and there is no evidence as to its whereabouts after its execution, and there is proof that no such document was found among the testator's papers, in his house, after his death. *Throckmorton v. Holt*, 180 U. S. 552, 21 Sup. Ct. 474, 45 L. Ed. 663, reversing 12 App. D. C. 552.

²² *Foster's Appeal*, 87 Pa. 67, 30 Am. Rep. 340.

²³ *Patten v. Poulton*, 1 Sw. & Tr. 55.

²⁴ *Goods of Gardner*, 1 Sw. & Tr. 109. See, also, *In re Hopkins' Will*, 35 Misc. Rep. 702, 72 N. Y. Supp. 415. The language in *Allan v. Morrison*, 69 Law J. P. C. 141 (1900) App. Cas. 604, to the effect that the presumption arising from the will's being traced to the possession of the testator, and its non-production at his death, that it was destroyed by him *animo cancellandi*, can only be rebutted by such evidence as produces moral conviction that it was not so destroyed, while perhaps justified by the facts of the case, is unquestionably too strong a statement of the general doctrine.

²⁵ *Sprigge v. Sprigge*, L. R. 1 P. & D. 608.

Presumption Regarding Mutilation

Where a will has been duly executed and left with the testator, if it be mutilated in his lifetime while in his possession, or if, upon his death, it be found among his repositories, canceled or defaced, in such cases, in the absence of proof, the testator is presumed to have done the act with intent to revoke;²⁶ and the same holds true of mutilation occasioned during the testator's life, though others than he had access to the place where the will was deposited.²⁷ But the presumption fails when there is nothing to show that mutilation occurred during the lifetime of the testator, and there are suspicious circumstances connected with the conduct of a person who had access to the will subsequent to the death of the testator, and who was interested to defeat the will.²⁸

Evidence Relevant to Prove Revocation

While there is substantial authority for the view that declarations of the testator, to be admissible on the question of revocation, must accompany the alleged act of revocation so closely as to be a part thereof,²⁹ yet the sounder and more modern view is that, when the state of the testator's mind regarding the existence or revocation of a will is material, his declarations may be proved, not as evidence of what they recite, but as indicative of the testator's mental state.³⁰ But such declarations are not sufficient evidence of the

²⁶ *Bennett v. Sherrod*, 25 N. C. 303, 40 Am. Dec. 410; *Thomas v. Thomas*, 76 Minn. 237, 79 N. W. 104, 77 Am. St. Rep. 639; *Christmas v. Whinyates*, 3 Sw. & Tr. 81; *Stephens v. Taprell*, 2 Curt. 458.

²⁷ *Bennett v. Sherrod*, *supra*; *COLLYER v. COLLYER*, 110 N. Y. 481, 18 N. E. 110, 6 Am. St. Rep. 405, *Dunmore Cas. Wills*, 158; *In re Philp*, 64 Hun, 635, 19 N. Y. Supp. 13.

The facts may be such as to show that the mutilation occurred before the will was executed. *In re Homes' Will (Sur.)* 11 N. Y. Supp. 898.

²⁸ *Bennett v. Sherrod*, *supra*.

²⁹ *Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71; *Throckmorton v. Holt*, 180 U. S. 552, 21 Sup. Ct. 474, 45 L. Ed. 663; *Glass v. Scott*, 14 Colo. App. 377, 60 Pac. 186; *Caeman v. Van Harke*, 33 Kan. 333, 6 Pac. 620; *In re Colbert's Estate (1904)* 31 Mont. 461, 78 Pac. 971, 80 Pac. 248, 107 Am. St. Rep. 439, 3 Ann. Cas. 952. And see *Jackson v. Betts*, 6 Cow. (N. Y.) 377; *Doe v. Perkes*, 3 B. & Ald. 489; *Bibb v. Thomas*, 2 W. Bl. 1043.

³⁰ *Lawyer v. Smith*, 8 Mich. 411, 77 Am. Dec. 460 (where declarations, oral and written, of the testatrix that she had destroyed her will, were held admissible); *Law v. Law*, 83 Ala. 432, 3 South. 752; *Burton v. Wylde*, 261 Ill. 397, 103 N. E. 976; *Behrens v. Behrens*, 47 Ohio St. 323, 25 N. E. 209, 21 Am. St. Rep. 820; *In re Steinke's Will*, 95 Wis. 121, 70 N. W. 61 (holding declaration of the testatrix that the will was in existence admissible); *Patterson v. Hickey*, 32 Ga. 156; *Ford v. Ford*, 7 Humph. (Tenn.) 92; *Boudinot v. Bradford*, 2 Yeates (Pa.) 170. And see *In re Weston*, L. R. 1 P. & D. 633; *Collagan v. Burns*, 57 Me. 449; *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322. See, also, *Wigmore on Ev.* § 1737, and cases there cited.

fact of revocation,³¹ and some act capable of being regarded as an act of revocation must be shown before they can be received.³²

The declarations of a beneficiary, admitting a revocation of the will, may be received, as against interest, in so far as the interest of other beneficiaries will not be affected thereby.³³ And on the issue whether the testator had destroyed a will which he retained, but which could not be found, evidence may be given of the testator's character, condition, and acts, as well as of the conduct of those around him after the making of the will.³⁴

While the placing of his will by the testator among worthless papers, in a secure place, is probably a fact to be considered, yet from it alone no intention to revoke can be inferred, when the will is undefaced and intact.³⁵ Testimony as to why the testatrix revoked her will is immaterial, when there is no question as to the fact of revocation.³⁶

Will Executed in Duplicate

Where a will is executed in duplicate, the testator retaining one copy and giving the other to his wife, the instrument offered for probate is presumed to be the one retained by the testator, although it does not appear what became of the other, and no presumption of revocation based on the possibility of his having destroyed the copy retained by him arises.³⁷

REPUBLICATION DEFINED—HOW EFFECTED

90. Republication is the method by which a will which has been imperfectly executed, or revoked, is given or restored to potential efficiency.
91. Republication is either express or constructive. Express republication occurs when the testator executes the will anew with a view of giving it effect as his will.
92. Constructive republication occurs when the testator executes a codicil referring to the prior will, which is therewith incorporated and given effect as of the date of the codicil.

³¹ *Haines v. Stewart*, 2 Sw. & Tr. 320; *Stevens v. Stevens*, 72 N. H. 360, 56 Atl. 916.

³² *Woodruff v. Hundley*, 127 Ala. 640, 29 South. 98, 85 Am. St. Rep. 145.

³³ *In re Lamble's Estate*, 97 Mich. 49, 56 N. W. 223.

³⁴ *Gardner v. Gardner*, 177 Pa. 218, 35 Atl. 558.

³⁵ *Succession of Blakemore*, 43 La. Ann. 845, 9 South. 496.

³⁶ *Scoggins v. Turner*, 98 N. C. 135, 3 S. E. 719.

³⁷ *Snider v. Burks*, 84 Ala. 53, 4 South. 225.

The term republication, in so far as it suggests a declaration of the instrument in question as a will, is inaccurate, for, as has been seen, in the absence of an express statutory requirement to that effect, publication in this sense is not essential to the due execution of a will. The term signifies the restoration to potential efficiency as a will of a document whose original power has been destroyed by revocation, or which never had such power by reason of defective execution.

The Law Prior to 1838

Under the statute of frauds,³⁸ no will of lands could be republished except by re-execution or a duly executed codicil. But the law relating to wills of personalty remained unaffected, and such wills might be republished not merely by an unattested codicil or other writing, but even by parol declarations of the testator.³⁹ And the mere conservation of a will for a long time might, under circumstances sufficient to clearly indicate the intent, amount to a republication.⁴⁰

This principle applied whether the revocation was by the execution of a subsequent will or by cancellation.⁴¹ In the case of two wills, however, some direct and unequivocal act of republication was required to set up the will of earlier date, there being a strong presumption in favor of the last-dated will, which remained uncanceled.⁴²

The Present Law

By statute 1 Vict. c. 26,⁴³ it was provided that no will or codicil, or any part thereof, which shall be revoked shall be revived otherwise than by the re-execution thereof, or by a codicil executed in accordance with the requirements for the execution of wills, and showing an intention to revive the same. Similar legislation has

³⁸ 29 Car. II, c. 3, § 5 (1677).

³⁹ Beckford v. Parnecott, Cro. El. 493; Havard v. Davis, 2 Bin. (Pa.) 406; Cogdell's Ex'rs v. Cogdell's Heirs, 3 Desaus. (S. C.) 346; Miller v. Brown, 2 Hagg. 209, 1 Wms. Ex'rs, 245.

Before the statute of frauds, anything which showed an intent that a will of lands should be of subsequent date was a sufficient republication. 1 Roll. Abr. 618, pl. 7; Barnes v. Crowe, 1 Ves. Jr. 497; Anon., 2 Show. 48.

⁴⁰ Long v. Aldred, 3 Add. 48; Braham v. Burchell, 3 Add. 264.

⁴¹ 1 Wms. Ex'rs, 250.

⁴² 1 Wms. Ex'rs, 248; Stride v. Cooper, 1 Phillim. 336.

There is said to have been no case where a later will, with a revocatory clause remaining uncanceled, and in the same repository with a former will, was set aside on the ground of the republication of the prior will by mere declarations. 1 Wms. Ex'rs, 248 (citing Daniel v. Nockolds, 3 Hagg. 777. And see Witter v. Mott, 2 Conn. 67; Battle v. Speight, 31 N. C. 288; Dunlap v. Dunlap, 4 Desaus. [S. C.] 305, 321).

⁴³ Section 22 (1837).

been enacted in most, if not all,⁴⁴ of the states of the United States, so that revival must now be had by one of these methods, or not at all.⁴⁵

When a will is republished by re-execution, the principles already discussed regarding the execution of wills obtain,⁴⁶ and require no further reference here.

Republication by Codicil

While the language of the statutes varies somewhat, it may be said that a codicil, duly executed, will effect a republication of a prior will, when such effect was intended.⁴⁷ The codicil need not set forth in express terms the testator's intent to republish the will.⁴⁸ Any reference which makes such intent obvious is sufficient,⁴⁹ as a reference to "my will,"⁵⁰ or to the will by date,⁵¹ or to

⁴⁴ In Pennsylvania there are several cases which intimate that republication may still be had by parol. See *In re Jacoby's Estate*, 28 Pittsb. Leg. J. (N. S.) 17; *In re Gillespie's Will*, 26 Pittsb. Leg. J. (N. S.) 222; *Forquer's Estate*, 216 Pa. 331, 66 Atl. 92, 8 Ann. Cas. 1146. But in a recent case, *In re Holmes Estate*, 240 Pa. 537, 87 Atl. 778, the court expressed doubt as to the possibility of a parol republication.

⁴⁵ Thus the refiling of a revoked will with the county judge effects no revival, though such may have been the testator's intent. *In re Noon's Will*, 115 Wis. 299, 91 N. W. 670, 95 Am. St. Rep. 944. Neither does a parol declaration by the testator that he wishes the revoked will to stand. *In re Stickney's Will*, 161 N. Y. 42, 55 N. E. 396, 76 Am. St. Rep. 246; *Danley v. Jefferson*, 150 Mich. 590, 114 N. W. 470, 121 Am. St. Rep. 640, 13 Ann. Cas. 242. And a portion of a will revoked by erasure cannot be re-established merely by restoring the words erased. *Safe Deposit & Trust Co. v. Thorn*, 117 Md. 154, 83 Atl. 45.

⁴⁶ *Sanders v. Babbitt*, 106 Ky. 646, 51 S. W. 163; *Stewart v. Mulholland*, 88 Ky. 38, 10 S. W. 125, 21 Am. St. Rep. 320. See, however, *In re Brock's Estate*, 247 Pa. 365, 93 Atl. 487, L. R. A. 1915D, 1140 (where rewriting of signature held a republication).

Although it has been held that the subscribing witnesses need not sign a second time in order to give validity to a dispositive clause inserted in the will, in their presence and in that of testator, a few days after its execution (*Wright v. Wright*, 5 Ind. 389), it is submitted that this view cannot be sustained either on principle or by the authorities (*Hesterberg v. Clark*, 166 Ill. 241, 46 N. E. 734, 57 Am. St. Rep. 135).

⁴⁷ *Pope v. Pope*, 95 Ga. 87, 22 S. E. 245 (where the codicil referred to the will by date, and mentioned provisions therein); *McCurdy v. Neall*, 42 N. J. Eq. 333, 7 Atl. 566 (where codicil expressly confirmed the will); *Cook v. White*, 167 N. Y. 588, 60 N. E. 1109 (where codicil ratified will); *Illensworth v. Illensworth*, 39 Misc. Rep. 194, 79 N. Y. Supp. 410; *In re Knapp's Will* (Sur.) 23 N. Y. Supp. 282; *Hawke v. Euyart*, 30 Neb. 149, 46 N. W. 422, 27 Am. St. Rep. 391; *In re Walton's Estate*, 194 Pa. 528, 45 Atl. 426; *In re Lee's Estate*, 15 Mont. Co. Law R. (Pa.) 70.

⁴⁸ *Francis v. Marsh*, 54 W. Va. 545, 46 S. E. 573, 1 Ann. Cas. 665.

⁴⁹ *Blackett v. Ziegler* (1911) 153 Iowa, 344, 133 N. W. 901, 37 L. R. A. (N. S.) 29, Ann. Cas. 1913E, 115.

⁵⁰ *In re Nisbet*, 5 Dem. Sur. (N. Y.) 287. A codicil will refer to the last in date of several wills, if no date is named. *Crosbie v. McDoual*, 4 Ves. 610.

⁵¹ *Payne v. Payne*, 18 Cal. 291.

"another codicil" by a second codicil.⁵² And the codicil need not be attached to the will.⁵³ The due execution of the codicil by a competent testator gives effect to the prior instrument incorporated therein, though the latter be improperly executed,⁵⁴ or executed by a testator under undue influence,⁵⁵ or under a disability, as coverture;⁵⁶ and the same result follows as regards wills executed by infants or insane persons, when the subsequent instrument is executed after the disability has been removed.⁵⁷

A codicil expressly referring to a will revives it, although the will referred to had been revoked by a later subsisting will, and parol evidence is not admissible to show that testator intended to refer to the later will.⁵⁸

Consequences of Republication

The republication of a will brings it down to the date of the republishing, as though originally executed at that time. A will thus republished is substantially a new will.⁵⁹ But the effect of republication can never extend further than to give the words the same force and operation that they would have had, had the will been executed at the time of republication. It cannot invest with a dispositive efficacy expressions which originally had none, or alter the construction of the will so as to cure any defect of expression therein.⁶⁰ If the will refer expressly to the date of its own execution, it will not speak as of the date of the codicil republishing it.⁶¹

⁵² *Ingoldby v. Ingoldby*, 4 Wkly. Notes Cas. (Eng.) 493.

⁵³ *Van Cortlandt v. Kip*, 1 Hill (N. Y.) 590; *Pope v. Pope*, 95 Ga. 87, 22 S. E. 245; *Appeal of Wikoff*, 15 Pa. 281, 53 Am. Dec. 597.

⁵⁴ *In re Walton's Estate*, 194 Pa. 528, 45 Atl. 426; *McCurdy v. Neall*, 42 N. J. Eq. 333, 7 Atl. 566; *Skinner v. Society*, 92 Wis. 209, 65 N. W. 1037; *Mooers v. White*, 6 Johns. Ch. (N. Y.) 375.

⁵⁵ *Farr v. O'Neill*, 1 Rich. (S. C.) 80.

⁵⁶ 1 Wms. Ex'rs, 226; *Thomas v. Jones*, 1 De G., J. & S. 63; *Noble v. Phelps*, L. R. 2 P. & D. 276; *Braham v. Burchell*, 3 Add. 243.

⁵⁷ See 1 Redf. Wills, 374; *Brown v. Riggin*, 94 Ill. 560.

⁵⁸ *IN RE CAMPBELL'S WILL*, 170 N. Y. 84, 62 N. E. 1070, *Dunmore Cas. Wills*, 160; *Neff's Appeal*, 48 Pa. 501; *Walpole v. Orford*, 3 Ves. 402.

⁵⁹ *Barker v. Bell*, 46 Ala. 216; *In re Hayne's Estate*, 165 Cal. 568, 133 Pac. 277, Ann. Cas. 1915A, 926; *Miles v. Boyden*, 3 Pick. (Mass.) 213; *Brimmer v. Sohler*, 1 Cush. (Mass.) 118; *Murray v. Oliver*, 41 N. C. 55; *Jack v. Shoenberger*, 22 Pa. 416; *Van Kleeck v. Dutch Reformed Protestant Church*, 20 Wend. (N. Y.) 457; *Snowhill v. Snowhill*, 23 N. J. Law, 447.

⁶⁰ 1 Jar. Wills, 159, citing *Lane v. Wilkins*, 10 East, 241.

⁶¹ "To give a codicil the effect to republish a will so as to pass estates acquired between the date of the will and the date of the codicil, the words of the will must be of such a character as, if used at the date of the republication, would include the estate in controversy. If the language of the original

⁶¹ *Stilwell v. Mellersh*, 20 L. J. Ch. 356.

In accordance with this principle, it was held that a will disposing of all the testator's real estate, and republished by a codicil, operated to pass real estate acquired subsequent to the execution of the will.⁶² This doctrine is of less consequence than formerly, in view of the general statutory change in the common-law rule, in consequence of which change wills may operate upon subsequently acquired lands.⁶³

The republication of a will by a subsequent codicil effects a republication of prior codicils, inasmuch as they are constructively a part of the will thus republished.⁶⁴ Therefore a testator, by expressly referring to and confirming the will by a codicil, will not be considered as intending to set it up against intermediate codicils which alter, revoke, or make additions thereto.⁶⁵ And the same rule applies, though the codicil by which republication is effected refers to the prior will by its date.⁶⁶ No intention to exclude intermediate codicils is to be inferred therefrom. If, however, a codicil has not been duly executed, republication of the will by a subsequent codicil which merely refers to the will by its date will not effect a republication of the first codicil.⁶⁷ "The two classes of cases differ essentially. In the one class the question is, does the later codicil revoke the earlier and operative one? In the other, you inquire, does the later codicil set up the earlier and inoperative one? To one class of cases the principle applies that a clear disposition is not to be revoked except by clear words. To the other class this principle has no application."⁶⁸

But the republication of a will by means of a codicil works a commission will be such as, if used at the date of republication, would not include the after-purchased estate in its terms or description, or if the act of republication be accompanied with other provisions indicating that it was the intent of the testator to limit the operation of the will, as republished, to the same estate which was given and would legally pass by the original will, then, notwithstanding such republication, the devise will not include the after-purchased estate." *Haven v. Foster*, 14 Pick. (Mass.) 541. Accord: *In re Farrer*, 8 Ir. Com. Law R. 370. And see the language of Lord Cranworth in *Stilwell v. Mellersh*, 20 L. J. Ch. 356, 361.

⁶² *Barnes v. Crow*, 4 B. C. C. 2. See *Potter v. Potter*, 1 Ves. 437; *Miles v. Boyden*, 3 Pick. (Mass.) 213; *Langdon v. Astor's Ex'rs*, 16 N. Y. 9; *Corr v. Porter*, 33 Grat. (Va.) 278.

⁶³ See ante, p. 148.

⁶⁴ *Manship v. Stewart* (1914) 181 Ind. 299, 104 N. E. 505.

⁶⁵ *Crosble v. McDoual*, 4 Ves. 610; the court remarking that, if a man ratifies and confirms his last will, he ratifies and confirms it with every codicil that has been added to it. Accord: *In re Lee's Estate*, 16 Pa. Super. Ct. 627.

⁶⁶ *Green v. Tribe*, 9 Ch. D. 231.

⁶⁷ *Burton v. Newbery*, 1 Ch. D. 234.

⁶⁸ *Fry, J.*, in *Green v. Tribe*, 9 Ch. D. 231.

plete revocation of all other wills which are inconsistent with that republished, there being an obvious difference between wills and codicils in this respect.⁶⁹

Republication has no effect to revive legacies which have been adeemed or satisfied.⁷⁰ Neither will a holographic codicil, in jurisdictions recognizing holographic wills as valid without attestation, republish an unattested instrument not wholly in the handwriting of the testator.⁷¹

Where the statute renders void a testamentary gift to a charitable use, if made within thirty days of the testator's death, a gift in a will is not rendered invalid by the execution of a codicil to the will within the thirty days.⁷²

⁶⁹ *Rogers v. Pittis*, 1 Add. 38; *Walpole v. Cholmondeley*, 7 T. R. 138; *IN RE CAMPBELL'S WILL*, 170 N. Y. 84, 62 N. E. 1070, *Dunmore Cas. Wills*, 160.

⁷⁰ *Tanton v. Keller*, 167 Ill. 129, 47 N. E. 376; *Langdon v. Astor's Ex'rs*, 16 N. Y. 9.

⁷¹ *Sharp v. Wallace*, 33 Ky. 584. See *Love v. Johnston*, 34 N. C. 355; *Sawyer's Legatees v. Sawyer's Heirs*, 52 N. C. 134.

⁷² *In re McCauley's Estate*, 138 Cal. 432, 71 Pac. 512; *In re Morrow's Estate*, 204 Pa. 479, 54 Atl. 313.

CHAPTER X

CONFLICT OF LAWS

93-94. Real Property Controlled by Law of Place—Personal Property by Law of Domicile.**REAL PROPERTY CONTROLLED BY LAW OF PLACE—
PERSONAL PROPERTY BY LAW OF DOMICILE**

93. In so far as it affects real property, the mode of execution, and the validity of a will are controlled by the law of the jurisdiction in which the land is situated.
94. In so far as it affects personal property, the requisites, validity, and construction of a will are controlled by the law of the testator's domicile.

The distinction above indicated has been recognized from the earliest times by the English law. It is manifestly appropriate, as well as inevitable, that the method of transmitting title to the territory over which sovereignty is exercised should be controlled by the sovereign; hence the rule of the black-letter text regarding realty.¹ So for the disposition of property of this sort, the place where a will happens to be made, and the language in which it is written, are wholly unimportant as affecting its validity and the ceremonial of its execution.² Hence a will, attested by two witnesses, though valid in the testator's domicile, is inoperative to pass title to land located in a jurisdiction where a greater number of

¹ *Varner v. Bevil*, 17 Ala. 286; *Norris v. Harris*, 15 Cal. 226; *Irwin's Appeal*, 33 Conn. 128; *Readman v. Ferguson*, 13 App. D. C. 60; *Hays v. Ernest*, 32 Fla. 18, 13 South. 451; *KNIGHT v. WHEEDON*, 104 Ga. 309, 30 S. E. 794; *Dunmore Cas. Wills*, 168; *Bland v. Bland*, 103 Ill. 12; *Evansville Ice & Cold Storage Co. v. Winsor*, 148 Ind. 682, 48 N. E. 592; *Otto v. Doty*, 61 Iowa, 23, 15 N. W. 578; *Robertson v. Barbour*, 6 T. B. Mon. (Ky.) 523; *Du Puy v. Mineral Co.*, 88 Me. 202, 33 Atl. 976; *Proctor v. Clark*, 154 Mass. 45, 27 N. E. 673, 12 L. R. A. 721; *Goodall v. Marshall*, 11 N. H. 88, 35 Am. Dec. 472; *White v. Howard*, 46 N. Y. 144; *Koppel v. Holm*, 23 Misc. Rep. 557, 52 N. Y. Supp. 830; *Leake v. Gilchrist*, 13 N. C. 73; *McCune's Devisees v. House*, 8 Ohio, 144, 31 Am. Dec. 438; *Bolling v. Bolling*, 88 Va. 524, 14 S. E. 67; *In re Stewart's Estate*, 26 Wash. 32, 66 Pac. 148, 67 Pac. 723; *Ford v. Ford*, 70 Wis. 19, 33 N. W. 188, 5 Am. St. Rep. 117; *Darby's Lessee v. Mayer*, 10 Wheat. 465, 6 L. Ed. 367; *Handley v. Palmer* (C. C.) 91 Fed. 948. See, also, note, 48 L. R. A. 133.

² 1 Jar. Wills, 1.

witnesses is required.³ The *lex loci rei sitæ* also determines the effect of an act of revocation upon a will disposing of land;⁴ and, although the policy of laws, requiring wills disposing of property to charity to be executed a certain time before testator's death, seems to be to protect the citizens of the state when they are enacted,⁵ the courts have usually determined the validity of a devise of realty according to the statute in the jurisdiction in which land is situated.⁶

In so far as the manner of execution of a will is concerned, the rules above stated have been very generally changed by statute.⁷

Interpretation of Wills of Realty

In interpreting the language of any will, the thing to be got at is what the testator meant. When this meaning is clear, it is effectuated, if it can legally be done. When certain language is used in a will which has one meaning in the testator's domicile and another in the jurisdiction where the land is situated, it seems only fair to suppose that the language was used in the sense with which the testator was presumably familiar, namely that of the domicile, and such, both on principle and by weight of authority, is the rule.⁸ Many cases hold that the interpretation of a devise must depend upon the law of the place where the land is situated.⁹ The apparent absurdity of this view is pointedly shown by Professor Minor's remark that, if the testator had land lying in different

³ *KNIGHT v. WHEEDON*, 104 Ga. 309, 30 S. E. 794, *Dunmore Cas. Wills*, 168.

⁴ *Evansville Ice & Cold Storage Co. v. Winsor*, 148 Ind. 682, 48 N. E. 592; *Ware v. Wisner* (C. C.) 50 Fed. 310; *Minor, Conf. Laws*, § 149.

⁵ *Minor, Conf. Laws*, § 144.

⁶ *Huidekoper v. Perry*, 7 O. C. D. 326 (where devise of Ohio realty to a charity by one domiciled in Pennsylvania was held invalid because made within year contrary to Ohio statute).

⁷ See post, p. 270.

⁸ *Ford v. Ford*, 80 Mich. 42, 44 N. W. 1057; *Ball v. Phelan* (1909) 94 Miss. 293, 49 South. 956, 23 L. R. A. (N. S.) 895; *Ford v. Ford*, 70 Wis. 19, 33 N. W. 188, 5 Am. St. Rep. 117; *Proctor v. Clark*, 154 Mass. 45, 27 N. E. 673, 12 L. R. A. 721; *Lincoln v. Perry*, 149 Mass. 368, 21 N. E. 671, 4 L. R. A. 215 (holding that in a devise of land, outside the state, to a beneficiary and her "heirs," the word "heirs" was to be interpreted according to the law of Massachusetts, and that the husband of the beneficiary, being an heir of his wife in the latter state, would take, although he was not an heir, in the state where the land was situated). Accord: *Keith v. Eaton*, 58 Kan. 732, 51 Pac. 271; *Guerard v. Guerard*, 73 Ga. 506.

⁹ *Peet v. Peet*, 229 Ill. 341, 82 N. E. 376, 13 L. R. A. (N. S.) 780, 11 Ann. Cas. 492; *McCartney v. Osburn*, 118 Ill. 409, 9 N. E. 210; *Harlan v. Manington* (1911) 152 Iowa, 707, 133 N. W. 367; *Jacobs v. Whitney*, 205 Mass. 477, 91 N. E. 1009, 18 Ann. Cas. 576; *Applegate v. Smith*, 31 Mo. 166; *Ives v. McNicoll*, 59 Ohio St. 402, 53 N. E. 60, 43 L. R. A. 772, 69 Am. St. Rep. 780.

states, it might result in attributing to him an intent to use the same language in as many different senses as there were parcels of land.¹⁰ It is possible, however, that this view, historically, may rest upon considerations of policy, independent of the question of the testator's intent.

Personal Property

Since personal property has, broadly speaking, no locus apart from the domicile of its owner, and there being no reason why the sovereign within whose jurisdiction it chances to be physically situated should interfere with the method of its devolution, it is steadily held that in regard to testamentary capacity, method of execution,¹¹ and construction¹² the law of the state or country in which the testator was domiciled at the time of his death controls. Leaseholds of land situated in one state, and owned by the resident of another, are personal property, and, so far as their transmission by will is concerned, are governed by the law of the domicile of the lessee.¹³

Where testator changes his domicile after the execution of his will, by the better rule, the law of the testator's domicile at the time of the execution of the will controls its interpretation and construction.¹⁴

The law of the domicile at the time of death determines the formal validity of the will, unless the statute provides otherwise. It follows that a will of personal property, executed in accordance with the law of the testator's domicile at the time, may become invalid upon a subsequent change to a domicile whose requirements are different and in which the testator dies.¹⁵ As a general rule,

¹⁰ Minor, Conf. Laws, § 145, note 4.

¹¹ Johnson v. Copeland's Adm'r, 35 Ala. 521; Yore v. Cook, 67 Ill. App. 586; Dorsey's Ex'r v. Dorsey's Adm'r, 5 J. J. Marsh. (Ky.) 280, 22 Am. Dec. 33; Lawrence v. Kitteridge, 21 Conn. 577, 56 Am. Dec. 385; Irving v. McLean, 4 Blackf. (Ind.) 53; Gilman v. Gilman, 52 Me. 165, 83 Am. Dec. 502; Fellows v. Miner, 119 Mass. 541; Nat v. Coons, 10 Mo. 543; Despard v. Churchill, 53 N. Y. 192; Chamberlain v. Chamberlain, 43 N. Y. 424.

¹² Rackemann v. Taylor, 204 Mass. 394, 90 N. E. 552; Dammert v. Osborn, 140 N. Y. 30, 35 N. E. 407; Sickles v. City of New Orleans, 80 Fed. 868, 26 C. C. A. 204; Ferguson's Will (1902) 1 Ch. 483.

¹³ Despard v. Churchill, 53 N. Y. 192.

¹⁴ Staigg v. Atkinson, 144 Mass. 564, 12 N. E. 354; Minor, Conf. Laws, § 148.

¹⁵ Moultrie v. Hunt, 23 N. Y. 304; Irwin's Appeal, 33 Conn. 128; Nat v. Coons, 10 Mo. 543; SHUTE v. SARGENT, 67 N. H. 305, 36 Atl. 282, Dunmore Cas. Wills, 170. And see Minor, Conf. Laws, 143.

In Moultrie v. Hunt, supra, a testator domiciled in South Carolina executed his will and acknowledged the seal and signature to the witnesses. Under the law of South Carolina, this was sufficient. The testator subse-

the validity of the provisions of a will of personalty is determined by the law of the domicile.¹⁶ But vague and indefinite trusts, whose enforcement in a jurisdiction other than that of the domicile is contemplated by the will, may be sustained if such trusts are capable of enforcement in that jurisdiction, though void under the law of the domicile.¹⁷ The tendency of the earlier cases, however, was otherwise.¹⁸ So, if the will disposes of property in another state, with the intention that it shall remain there, the validity of the disposition is not affected by the law relating to perpetuities or accumulations in the state of the domicile.¹⁹ The validity of a bequest, as involving limitations upon the testator's capacity to bequeath his property to charity, or requiring the will to be executed a certain period before his death, or as concerning restraints upon testamentary capacity in general, as that of infants or married women, is determined by the law of the domicile.²⁰

Statutory Changes

In consequence of the hardships occasionally resulting from the rules stated in the black-letter text, statutes, affecting alike wills of realty or of personalty have generally been enacted, either admitting to probate all wills which might have been probated in the state or country in which they were made,²¹ or wills which have been actually so probated.²²

quently removed to New York, and died there. In the latter jurisdiction an acknowledgment of the will as such was necessary. Held, that the will must fail as not being executed in compliance with the law of the testator's domicile at the time of his death.

¹⁶ *Fellows v. Miner*, 119 Mass. 541; *Dammert v. Osborn*, 140 N. Y. 30, 35 N. E. 407; *Penfield v. Tower*, 1 N. D. 216, 46 N. W. 413; *Williams v. Saunders*, 5 Cold. (Tenn.) 60; *American Bible Soc. v. Pendleton*, 7 W. Va. 79.

¹⁷ *Healy v. Reed*, 153 Mass. 197, 26 N. E. 404, 10 L. R. A. 766; *Sohler v. Burr*, 127 Mass. 221; *Hope v. Brewer*, 136 N. Y. 126, 32 N. E. 558, 18 L. R. A. 458.

In the last case a will was made in New York, establishing a trust for a charity in Scotland, the bequest being valid under the law of Scotland, but too indefinite for enforcement under the laws of New York. The court of the latter state, however, sustained the bequest.

¹⁸ See *Wood v. Wood*, 5 Paige (N. Y.) 596, 28 Am. Dec. 451; *Montgomery v. Millikin*, 5 Smedes & M. (Miss.) 151, 43 Am. Dec. 507.

¹⁹ *Chamberlain v. Chamberlain*, 43 N. Y. 424, where it was held that a bequest by a testator, domiciled in New York, to a Pennsylvania corporation, for charitable purposes, which offended the New York statute against perpetuities, depended for its validity upon the law of Pennsylvania. See, also, *Gray*, *Rule against Perpetuities* (2d Ed.) § 263b.

²⁰ *Minor*, *Conf. Laws*, § 144.

²¹ *Slocomb v. Slocomb*, 13 Allen (Mass.) 38; *Bayley v. Bailey*, 5 Cush. (Mass.) 245.

²² *Green v. Alden*, 92 Me. 177, 42 Atl. 358, construing Rev. St. 1883, c. 64, §§ 13, 14.

Lapse—Election

The law of the domicile determines the effect of a lapse by the death of a devisee or legatee, whether the property shall pass under the residuary clause, or the case be regarded as one of partial intestacy.²³ So where provision is made by a husband's will for his wife, and the instrument is silent as to whether such provision is in lieu of her distributive share of the personalty, the question as to how the will is to be interpreted in this regard is to be determined by the law of the domicile,²⁴ regardless of where the property may be. And where a testamentary provision is thus made for the wife, while it cannot affect her dower rights in land situated elsewhere than in the testator's domicile, yet the courts of the jurisdiction containing the land will put the wife to her election, if such be the law of the domicile, though under the law of their own jurisdiction the widow might take both.²⁵ If the widow is disabled from making an election, as by insanity, the courts of her husband's domicile may make the election for her, and the decree to this end is treated as conclusive in the courts of other states.²⁶

When a will disposes of all the testator's property, and is operative with regard to the personalty and some of the realty, but inoperative with regard to a portion of the latter by reason of its location, a beneficiary under the will, who is also an heir to the realty upon which the will does not operate, is put to his election between the valid benefit which he takes under the will and the property to which he succeeds as heir.²⁷

Revocation of Wills of Personalty

The effect of an act of revocation upon a will of personalty, whether express or arising from implication of law, is determined by the law of the testator's domicile.²⁸ Since an act of revocation, once accomplished, is final, no subsequent change of domicile can affect its consequences in any way.

²³ *Rockwell v. Bradshaw*, 67 Conn. 9, 34 Atl. 758; *Lowndes v. Cooch*, 87 Md. 478, 39 Atl. 1045, 40 L. R. A. 380; *Anstruther v. Chalmer*, 2 Sim. 1; *Thornton v. Curling*, 8 Sim. 310.

²⁴ *Slaughter v. Garland*, 40 Miss. 172.

Where testator changes his domicile after the execution of his will, on principle, the question of interpretation in this connection should be determined according to the law of the domicile at the execution of the will. See *Staigg v. Atkinson*, 144 Mass. 564, 12 N. E. 354; *Minor*, Conf. Laws, § 148.

²⁵ *Washburn v. Van Steenwyk*, 32 Minn. 336, 20 N. W. 324; *Bolling v. Bolling*, 88 Va. 524, 14 S. E. 67.

²⁶ *Slaughter v. Garland*, 40 Miss. 172; *Washburn v. Van Steenwyk*, *supra*.

²⁷ *Brodie v. Barry*, 2 Ves. & B. 127; *Balfour v. Scott*, 6 Bro. P. C. 550.

²⁸ *Sneed v. Ewing*, 5 J. J. Marsh. (Ky.) 460, 22 Am. Dec. 41; *Price v. Dewhurst*, 8 Sim. 437.

If a will is alleged to have been revoked by a subsequent will, the question as to whether this effect is worked is determined by the law of the domicile. If, under that law, the subsequent will effects an immediate revocation, this determination is final; but if, by the law of the domicile, the second will has only a post mortem operation, its precise effect will then be determined by the testator's domicile at his death. So the effect of a subsequent marriage is determined by the law of the testator's domicile at the time of the marriage.²⁹ If, by the law of the domicile, the birth of a child for whom no provision is made revokes the will, this consequence follows, and it cannot be averted by a subsequent change of domicile. But, if revocation results only from the death of the testator whose will leaves the child unprovided for, then the law of the domicile at the time of his death controls.³⁰

Wills Exercising Powers of Appointment

Questions involving the validity of wills exercising a power of appointment over real property in a jurisdiction other than that of the testator are governed by the law of the situs.³¹ But a power of appointment by will over personal property offers some peculiarities.³² In this case the law looks behind the will by which the power of appointment is exercised to the will of the donor of the power, and the validity of the provisions of the donee's will in the exercise of the power is determined, not by the law of the donee's domicile, but by that of the domicile of the donor,³³ and the same principle, though perhaps with less reason,³⁴ applies to the form of execution,³⁵ and to the interpretation of its language.³⁶ In short,

²⁹ Goods of Reid, L. R. 1 P. & D. 74; Minor, Conf. Laws, § 149.

³⁰ Sneed v. Ewing, 5 J. J. Marsh. (Ky.) 460, 22 Am. Dec. 41. See Minor, Conf. Laws, § 149.

³¹ Polson v. Stewart, 167 Mass. 211, 45 N. E. 737, 36 L. R. A. 771, 57 Am. St. Rep. 452; Sewall v. Wilmer, 132 Mass. 131.

³² See note, 19 Harv. L. Rev. 122.

³³ Sewall v. Wilmer, 132 Mass. 131, 137; In re New York Life Ins. & Trust Co., 209 N. Y. 585, 103 N. E. 315.

³⁴ See Minor, Conf. Laws, § 150.

³⁵ Sewall v. Wilmer, 132 Mass. 131; Whart. Conf. Laws, § 590; Murphy v. Delchler (1909) A. C. 446.

A power to appoint by will may also be exercised by a will executed in accordance with the law of donee's domicile. D'Huart v. Harkness, 34 Beav. 324.

³⁶ Sewall v. Wilmer, supra; Cotting v. De Sartiges, 17 R. I. 668, 24 Atl. 530, 16 L. R. A. 367. Appeal of Bingham, 64 Pa. 345.

In Sewall v. Wilmer, supra, the donee of the power lived in Maryland, and her will gave all her property to which she should be entitled, in law or equity, at the time of her decease, to her husband. Under the laws of Maryland this was an insufficient execution of the power by reason of absence of reference to the power or the subject-matter, but it was sufficient to that end

for testamentary purposes, the donee of the power is apparently regarded as an instrumentality of the donor, and as constructively possessed of the latter's domicile so far as the exercise of the power is concerned.

Devises to Corporations

If the charter of a corporation prohibits it from taking by devise, it is incapacitated from thus taking in a foreign jurisdiction, for its powers are determined by its charter. But a corporation, not thus incapacitated by its charter, may take by devise in another state, though disabled from taking by will by the statute of wills of the state of its incorporation.³⁷ Though a corporation be authorized by the law of its origin to take land by devise, it cannot take land in a state where devises to corporations are forbidden.³⁸

Equitable Conversion

The validity of bequests of property treated as personalty by virtue of the doctrine of equitable conversion is determined by the law of the domicile;³⁹ whether or no the doctrine operates to produce this effect depends upon the law of the situs of the land.⁴⁰

Rules as to Domicile

Every person has a domicile somewhere, and can have but one, which is presumably at the place of his birth, and this domicile is presumed to continue until a change of domicile is shown.⁴¹ Every natural person, free and sui juris, may change his domicile at pleasure.⁴² A change of domicile is effected by a change of residence, coupled with an intent to abandon the former domicile and acquire a new one. A change of residence is not of itself sufficient, though, if long continued it is strong evidence to show the necessary intention.⁴³ For residence is not identical with domi-

in Massachusetts. The court of the latter state held the power to have been validly executed.

³⁷ *White v. Howard*, 38 Conn. 342; *American Bible Soc. v. Marshall*, 15 Ohio St. 537. Contra: *Starkweather v. Society*, 72 Ill. 50, 22 Am. Rep. 133.

³⁸ *In re Fox's Will*, 52 N. Y. 530, 11 Am. Rep. 751.

³⁹ *Lincoln v. Perry*, 149 Mass. 368, 21 N. E. 671, 4 L. R. A. 215; *Tonnele v. Zabriskie*, 51 N. J. Eq. 557, 26 Atl. 808.

⁴⁰ *Appel of Clark*, 70 Conn. 195, 39 Atl. 155; *In re Page's Estate*, 75 Pa. 87.

⁴¹ *Crosswell, Ex'rs*, 147, citing *Somerville v. Somerville*, 5 Ves. 750, 786, 787; *Inhabitants of Abington v. Inhabitants of North Bridgewater*, 23 Pick. (Mass.) 170; *Graham v. Public Adm'r*, 4 Bradf. Sur. (N. Y.) 128.

⁴² *Harral v. Harral*, 39 N. J. Eq. 279, 51 Am. Rep. 17 (holding naturalization in the country one adopts as his domicile unnecessary to effect such a change).

⁴³ *Moorhouse v. Lord*, 10 H. L. C. 283, 292; *Hodgson v. De Beauchesne*, 12 Moore P. C. 285, 328; *Allgood v. Williams*, 92 Ala. 551, 8 South. 722; *Gilman v. Gilman*, 52 Me. 165, 83 Am. Dec. 502; *Hallet v. Bassett*, 100 Mass. 170; *Thorndike v. City of Boston*, 1 Metc. (Mass.) 245.

cile, the latter being the state or country where a person actually or constructively has his permanent home.⁴⁴

Residence abroad in government service does not necessarily result in loss of domicile, though such will be the case if the official remains there with the intent to make the foreign country his home upon quitting the service.⁴⁵ So domicile is not lost by a change of residence for the benefit of one's health, if there is an intent to return after being restored.⁴⁶

Domicile of Married Women and Minors

A woman, on marriage, loses her own domicile, and acquires that of her husband.⁴⁷ After abandonment and judicial separation, she may reacquire a domicile of her own;⁴⁸ and even a complete separation, by consent, may have this result.⁴⁹

The domicile of the father of a legitimate minor and of the mother of an illegitimate one is the domicile of the minor,⁵⁰ and a change of domicile by such father, or mother, effects a change in that of the minor.⁵¹ Upon the death of the father, the domicile of the minor will change with that of the mother, so long as she remains unmarried.⁵² Upon her remarriage, whereby she acquires her husband's domicile, who is under no legal obligation to support his stepchildren, some authorities hold that the children retain the

⁴⁴ Minor, Conf. Laws, § 23. The courts have said that no exact definition can be given of "domicile," but that its existence must be determined from the facts of each case, taken as a whole. The above definition of Prof. Minor seems less open to objection than any heretofore proposed.

⁴⁵ Heath v. Sampson, 14 Beav. 441, 445.

⁴⁶ Dupuy v. Wurtz, 53 N. Y. 556; Still v. Woodville Corp., 38 Miss. 646.

⁴⁷ Greene v. Greene, 11 Pick. (Mass.) 410; Ames v. Duryea, 61 N. Y. 609; Dalhousie v. McDouall, 7 Cl. & Fin. 817.

⁴⁸ SHUTE v. SARGENT, 67 N. H. 305, 36 Atl. 282, Dunmore Cas. Wills, 170; Chapman v. Chapman, 129 Ill. 386, 21 N. E. 806; Barber v. Barber, 21 How. 582, 16 L. Ed. 226.

⁴⁹ In re Florance, 54 Hun, 328, 7 N. Y. Supp. 578. Compare Wickes' Estate, 128 Cal. 270, 60 Pac. 867, 49 L. R. A. 138.

Although generally the wife has been allowed to obtain a separate domicile only for the purpose of securing a divorce, a few of the modern cases have given the wife a right to acquire a domicile for other purposes when she has been unlawfully deserted by her husband. Watertown v. Greaves, 112 Fed. 183, 50 C. C. A. 172, 56 L. R. A. 865; SHUTE v. SARGENT, supra.

⁵⁰ 1 Underhill, Wills, § 35; In re High, 2 Doug. (Mich.) 515; Daly's Settlement, 25 Beav. 456; Dalhousie v. McDouall, 7 Cl. & Fin. 817; Munro v. Munro, 7 Cl. & Fin. 842.

⁵¹ Marks v. Marks (C. C.) 75 Fed. 321; Minor, Conf. Laws, § 37.

⁵² Minor, Conf. Laws, § 38; Lamar v. Micou, 112 U. S. 452, 5 Sup. Ct. 221, 28 L. Ed. 751; Van Matre v. Sankey, 148 Ill. 536, 36 N. E. 628, 23 L. R. A. 665, 39 Am. St. Rep. 196; Inhabitants of Dedham v. Inhabitants of Natick, 16 Mass. 135.

domicile which they had at their mother's remarriage until she becomes a widow or they become of age and select domiciles of their own.⁵³ There is authority, however, for the view that if, after her marriage, the minor actually lives in the stepfather's home, that becomes his domicile; otherwise not.⁵⁴

⁵³ *Lamar v. Micon*, supra; *School Directors of Borough of West Chester v. James*, 2 Watts & S. (Pa.) 568, 37 Am. Dec. 525; *Inhabitants of Freetown v. Inhabitants of Taunton*, 16 Mass. 52.

⁵⁴ *Minor*, *Confl. Laws*, § 39; *Blythe v. Ayres*, 96 Cal. 532, 31 Pac. 915, 19 L. R. A. 40; *Wheeler v. Hollis*, 19 Tex. 522, 70 Am. Dec. 363.

CHAPTER XI

PROBATE OF WILLS

- 95. Probate Defined.
- 96. Procedure in Probate Proceedings.
- 97. Effect of Probate.
- 98. Probate as Affected by Agreements not to Contest.
- 99. Probate of Lost or Destroyed Wills.
- 100. Probate or Record of Foreign Wills.

PROBATE DEFINED

95. Probate is essential to the legal validity of a will. By it is meant the certification, by the court or tribunal clothed with authority for that purpose, that the will has been executed by a competent testator in the manner required by law. The courts exercising this jurisdiction and the methods by which probate is effected depend wholly upon local legislation.

At common law no probate was necessary of wills disposing of realty only. The ecclesiastical courts exercised jurisdiction over wills of personal property from an early date.¹ This distinction has been almost universally abolished, and the jurisdiction intrusted to courts whose principal business is the settlement of estates of deceased persons, and which are variously known as probate courts, courts of ordinary,² surrogate,³ and orphans' courts.⁴ Occasionally this jurisdiction is confided to the county or circuit courts. Courts of chancery had no inherent probate powers,⁵ though over questions of revocation of probate jurisdiction is sometimes conferred by statute.

Probate in Common or Solemn Form

Two methods of proving a will are generally recognized—either in common form, or by form of law, also called the solemn form, or proving per testes. Proof is made in common form when the execu-

¹After the time of Richard II (A. D. 1378).

²Bush v. Lindsey, 24 Ga. 245, 71 Am. Dec. 117.

³As in New York. See Redf. Surr. Cts. 130-134.

⁴As in Pennsylvania and Maryland.

⁵Kerrich v. Brausby, 7 Brown, Parl. Cas. 437; Lynn v. Beaver, 1 Turn. & R. 63; Cousens v. Advent Church, 93 Me. 292, 45 Atl. 43.

tor presents it to the judge, and, in the absence of and without citing the parties interested, produces witnesses to prove the will.⁶ This method was employed to save time and expense, when there was apparently no question as to the validity of the document, and all the parties interested were harmonious.

Proof in solemn form was made when there was a contest over the will, on petition, after due citation to all parties interested, with careful separate and secret examination of the witnesses to the will. In the United States, where the probate of wills is made simple and inexpensive, proof is generally made in what is substantially proof in solemn form, though something akin to probate in common form is occasionally recognized by statute.⁷ Where probate of this sort is recognized, it may usually be contested within a limited time, and probate in solemn form be had.⁸

Jurisdiction in General, and as Determined by Domicile

The jurisdiction of the probate of wills is, primarily, exclusive in the probate court for the district in which the testator was domiciled at the time of his decease.⁹ Probate in any other jurisdiction is usually held to be inoperative and void,¹⁰ and no consent of the parties interested can make it valid.¹¹ Where, however, a testator owned land in the state where he was domiciled at the time of executing his will, and had claims against persons residing there, it has been held that probate might properly be allowed in his then domicile, though he was domiciled elsewhere at the time of his death,¹² and statutes sometimes permit wills of those domiciled

⁶ 1 Wms. Ex'rs, 325; *Waters v. Stickney*, 12 Allen (Mass.) 1, 90 Am. Dec. 122.

These witnesses testified, on oath, that the instrument exhibited was the true, whole, and last will and testament of the deceased, whereupon, and sometimes with even less proof, the instrument was admitted to probate. The oath of the executor as to all the essential facts was usually enough. 2 Bl. Comm. *508.

⁷ See *Jones v. Moseley*, 40 Miss. 261, 90 Am. Dec. 327; *George v. George*, 47 N. H. 44; *Noyes v. Barber*, 4 N. H. 406; *Armstrong v. Baker*, 31 N. C. 109; *Kinard v. Riddlehoover*, 3 Rich. (S. C.) 258.

⁸ 1 Woerner, Law of Administration, 468.

⁹ *Godwin v. Godwin*, 129 Ga. 67, 58 S. E. 652 (applying rule where land devised and all parties interested in a county other than that of testator's domicile); *Davis v. Upson*, 230 Ill. 327, 82 N. E. 824; *Harding v. Schapiro*, 120 Md. 541, 87 Atl. 951; *Rackemann v. Taylor*, 204 Mass. 394, 90 N. E. 552; *Gelser's Will*, 82 N. J. Eq. 311, 87 Atl. 628.

¹⁰ *In re Wickes' Estate*, 128 Cal. 270, 60 Pac. 867, 49 L. R. A. 138; *SWAN v. FIDELITY TRUST & SAFETY-VAULT CO.*, 91 Ky. 36, 14 S. W. 964, *Dunmore Cas. Wills*, 173; *In re Jones' Will*, 19 Misc. Rep. 80, 43 N. Y. Supp. 965.

¹¹ *In re Zerega*, 58 Hun, 505, 12 N. Y. Supp. 497.

¹² *Walton v. Hall's Estate*, 66 Vt. 455, 29 Atl. 803.

elsewhere to be admitted to probate whenever testator leaves assets where the will is offered for probate.¹³ While ordinarily equity has no jurisdiction to set aside the probate of a will,¹⁴ yet apparently relief may thus be given when no remedy exists elsewhere, as where the lessees of the testator are in possession, and no action can be maintained against the devisees while out of possession.¹⁵

Who May Propound a Will for Probate

Upon the death of the testator, on which alone the will becomes actually operative, and which must be established by the proponent,¹⁶ the will should be propounded by the executor, who is lawfully entitled to its custody.¹⁷ He can lawfully relieve himself from this obligation only by renouncing the trust and discharging himself of its custody. But, in event of unreasonable delay on his part, any person who is interested in the will, and who is not a mere intruder, may petition the probate court to have the will probated,¹⁸ the executor being cited to show cause why he should not assume the trust, or else refuse the same, and produce the will to enable the court to grant administration with will annexed.¹⁹ The probate of a prior will does not prevent interested parties from asking for the probate of a subsequent will, unless they were so connected with the former probate as to be estopped thereby.²⁰ But where fourteen years have elapsed since the death of the testator, the will being known to be in existence and accessible, one of the heirs, who had

¹³ *Jaques v. Horton*, 76 Ala. 238; *Knight v. Hollings*, 73 N. H. 495, 63 Atl. 88; *Gordon's Case*, 50 N. J. Eq. 397, 26 Atl. 268; *Rader v. Stubblefield*, 43 Wash. 334, 86 Pac. 560, 10 Ann. Cas. 20.

¹⁴ *Wallace v. Payne*, 9 App. Div. 34, 41 N. Y. Supp. 111.

¹⁵ *Wallace v. Payne*, *supra*.

¹⁶ *Prout v. McNab*, 6 Dem. Sur. (N. Y.) 154. It cannot be proved by repute. *Id.*

¹⁷ *Baker v. Bancroft*, 79 Ga. 672, 5 S. E. 46; *In re Melville's Goods*, 15 Prob. Div. 22; *Hodnett's Will*, 65 N. J. Eq. 329, 55 Atl. 75.

¹⁸ *Keniston v. Adams*, 80 Me. 290, 14 Atl. 203; *Lilly v. Tobbein*, 103 Mo. 477, 15 S. W. 618, 23 Am. St. Rep. 887.

It is frequently provided by statute that "any person interested" may propose probate. Under such statutes, persons interested include creditors of testator. *Edwards' Estate* (1908) 154 Cal. 91, 97 Pac. 23; beneficiaries named in the will, *Merrill v. Putnam*, 76 N. H. 390, 83 Atl. 94; and purchasers from devisees or legatees, *HANLEY v. KRAFTCZYK*, 119 Wis. 352, 96 N. W. 820, *Dunmore Cas. Wills*, 178; *Rankin's Estate*, 164 Cal. 138, 127 Pac. 1034.

¹⁹ It is the duty of the executor, or of any person who may have the will in his possession, to produce the will for probate; and statutory penalties are frequently imposed upon the intentional secretion, suppression, or destruction of a dead man's will by any party in possession thereof. Summary proceedings may also be taken to compel such party to produce the will.

²⁰ *Burns v. Travis*, 117 Ind. 44, 18 N. E. 45. For case of estoppel, see *In re Lyman's Will*, 14 Misc. Rep. 352, 36 N. Y. Supp. 117.

agreed at the time of the death to another scheme of distribution to be effected without regular administration proceedings, is estopped to prove the will and claim thereunder benefits which are inconsistent with the prior agreement, and adverse to the interests of the representatives of a deceased co-heir.²¹

Voluntary Nonsuit

In a proceeding to probate a will there are, strictly speaking, no parties, and none can withdraw or take a nonsuit, and thus put the matter where it was at the start;²² this for the reason that the action is of the nature of a proceeding in rem, for the benefit of all interested.²³

Limitation on Probate

In the absence of a statute to the contrary, there is no limit upon the time after the testator's death within which a will may be probated.²⁴ A will was admitted to probate in Massachusetts sixty-three years after the testator's death.²⁵ And no action apparently lies for neglect to probate the will, the remedy being to cite the offending custodian in the probate court.²⁶ Various limitations have been imposed by statute, from three years after the testator's death, as against bona fide purchasers from the heirs of the testator, in Indiana,²⁷ to twenty in Maine.²⁸ And statutes frequently provide that proof of any nuncupative will must be offered within six months after the speaking of the testamentary words.²⁹

In the absence of statute, lapse of time, coupled with concealment

²¹ Foote v. Foote, 61 Mich. 181, 28 N. W. 90.

²² In re Collins' Will, 125 N. C. 98, 34 S. E. 195; McMahon v. McMahon, 100 Mo. 97, 13 S. W. 208; In re Lasak, 131 N. Y. 624, 30 N. E. 112; Id., 57 Hun, 417, 10 N. Y. Supp. 844 (as applied to an executor).

²³ Hutson v. Sawyer, 104 N. C. 1, 10 S. E. 85; In re Young's Will, 123 N. C. 358, 31 S. E. 626; Old Colony Trust Co. v. Bailey, 202 Mass. 283, 88 N. E. 898.

²⁴ Duffy's Will, 127 App. Div. 174, 111 N. Y. Supp. 491; HANLEY v. KRAFTCZYK, 119 Wis. 352, 96 N. W. 820, Dunmore Cas. Wills, 178.

Where a will has been regularly proved in common form, the right to a caveat may be lost by lapse of time. Dupree's Will, 163 N. C. 256, 79 S. E. 611.

²⁵ HADDOCK v. BOSTON & M. R. CO., 146 Mass. 155, 15 N. E. 495, 4 Am. St. Rep. 295, Dunmore Cas. Wills, 175.

²⁶ In re Stephens, 1 Ch. 162 (1898).

²⁷ Burns' Rev. St. 1914, § 3131.

²⁸ Rev. St. 1903, c. 66, § 1.

Kentucky: Ten years. Reid's Adm'r v. Benge, 112 Ky. 810, 66 S. W. 997, 57 L. R. A. 253, 99 Am. St. Rep. 334.

Texas: Four years. Elwell v. Universalist Convention, 76 Tex. 514, 13 S. W. 552.

²⁹ See Greenleaf's Estate, 69 Wash. 478, 125 Pac. 789, decided under such a statute.

of the will by the subscribing witness who drew it, and denials by him that it had been made, will not prevent probate if there is clear proof of execution.³⁰ And where a will has been fraudulently concealed by a party interested in its suppression, the period of limitation, if there be one, does not begin to run until the existence of the will is discovered, provided reasonable diligence has been used to find it.³¹ Statutes of limitation make the customary provisions in favor of persons under disability at the time of the testator's death.³²

What Documents should be Offered for Probate

Every document which is testamentary in its nature should be presented for probate whenever discovered, whether before or after a regular probate, and whether it merely confirms the will already probated or partially revokes it,³³ or merely appoints executors,³⁴ or executes a power.³⁵ A document incorporated by reference need not be probated with the will,³⁶ though it is well to file copies with the will. Although it is not the province of a probate court to determine the legal validity of the provisions of a will, yet it is sometimes necessary to admit the will to probate in part and reject part, as where a clause was inserted during the life of the testator without his knowledge;³⁷ or by forgery, after his death;³⁸ or through fraud and undue influence;³⁹ or by the destruction of one page and the substitution of another in its stead.⁴⁰ The same rule applies when a document incorporated by reference cannot be effectuated as a part of the will, as not being in existence when the will was executed.⁴¹

³⁰ *In re Hesdra's Will*, 119 N. Y. 615, 23 N. E. 555.

³¹ *Appeal of Deake*, 80 Me. 50, 12 Atl. 790.

³² See *Fox v. Fee*, 167 N. Y. 44, 60 N. E. 281; *Bent v. Thompson*, 5 N. M. 408, 23 Pac. 234.

³³ *Weddall v. Nixon*, 17 Beav. 160; *Brenchley v. Still*, 2 Robert. 162; *Laughton v. Atkins*, 1 Pick. (Mass.) 535.

³⁴ 1 Wms. Ex'rs, 227, 389; *Goods of Barden*, L. R. 1 P. & D. 325; *Matter of Emmons*, 110 App. Div. 701, 96 N. Y. Supp. 506; *Conoway v. Fulmer* (1911) 172 Ala. 283, 54 South. 624, 34 L. R. A. (N. S.) 963.

³⁵ *Hughes v. Turner*, 4 Hagg. 30; *Tatnall v. Hankey*, 2 Moore, P. C. 342.

³⁶ *Balme's Estate*, Prob. 261 (1897); *Willey's Estate*, 128 Cal. 1, 60 Pac. 471; *Tuttle v. Berryman*, 94 Ky. 553, 23 S. W. 345.

³⁷ *Barton v. Robins*, 3 Phillim. 455, note B; *Goods of Duane*, 2 Sw. & Tr. 590.

³⁸ *Plume v. Beale*, 1 P. Wms. 388.

³⁹ *Eastis v. Montgomery*, 93 Ala. 293, 9 South. 311; *Harrison's Appeal*, 48 Conn. 202.

⁴⁰ *Varnon v. Varnon*, 67 Mo. App. 534 (in which case the contents of the portion destroyed may be proved by parol).

⁴¹ *In re Shillaber's Estate*, 74 Cal. 144, 15 Pac. 453, 5 Am. St. Rep. 433; *Minot v. Parker*, 189 Mass. 176, 75 N. E. 149.

Since probate merely determines the validity of the execution of the will, a duly executed instrument may be probated, although some of its provisions are invalid,⁴² or even although it contains no provision which is valid and enforceable.⁴³

Under the English practice, where alterations are shown to have been made before execution, an engrossed copy of the will as altered is probated, unless the construction of the will is likely to be affected by the appearance of the paper, when probate is made *in fac simile*.⁴⁴ When the will is written in a foreign language, a translation may accompany the probate.⁴⁵

Contested Probate—Parties

The discussion thus far has been confined to the probate of wills, to which there is no opposition. But contests are frequent, and the procedure in such cases is largely determined by statute. Under these statutes, any party interested or aggrieved (such are the usual terms) may object to the probate of a will. In general, it may be said that any person whose right to share in property in event of intestacy is unfavorably affected by the terms of the will is a party aggrieved or interested, within the purview of these statutes, such as a disinherited heir,⁴⁶ or a judgment creditor of such heir,⁴⁷ or a convict cut off by his wife's will of personalty,⁴⁸ or a remainderman whose interest was subject to defeat by the will of the life tenant,⁴⁹ or a judgment creditor of a devisee whose judgment is a lien upon the real estate devised, where the devise is revoked by a subsequent

⁴² *Estate of Pforr*, 144 Cal. 121, 77 Pac. 825.

⁴³ *Davis' Will*, 182 N. Y. 468, 75 N. E. 530 (admitting will to probate, although sole devisee, legatee, and executrix named died before testatrix); *Murray's Will*, 141 N. C. 588, 54 S. E. 435. Contra: *Clearspring Township v. Blough*, 173 Ind. 15, 88 N. E. 511, 89 N. E. 369.

Probate is not barred by the testator's conveyance, leaving no property on which the will can operate. *Morey v. Sohler*, 63 N. H. 507, 3 Atl. 636, 56 Am. Rep. 538.

⁴⁴ 1 Wms. Ex'rs, 831, 332; 1 Woerner, Law Administration, 486; *Gann v. Gregory*, 3 De G., M. & G. 777.

⁴⁵ 1 Wms. Ex'rs, 386.

⁴⁶ *Murphy's Ex'r v. Murphy* (Ky.) 65 S. W. 165 (and this though there was a prior will, excluding him, which had not been probated); *Reld v. Curtin*, 51 App. Div. 545, 64 N. Y. Supp. 833; *Murry v. Hennessey*, 48 Neb. 608, 67 N. W. 470; *Thomas v. Thomas*, 9 App. Div. 487, 41 N. Y. Supp. 276; *Snow v. Hamilton*, 90 Hun. 157, 35 N. Y. Supp. 775.

⁴⁷ *In re Langevin*, 45 Minn. 429, 47 N. W. 1133; *BLOOR v. PLATT*, 78 Ohio St. 46, 84 N. E. 604, 14 Ann. Cas. 332, *Dunmore Cas. Wills*, 180.

⁴⁸ *Kenyon v. Saunders*, 18 R. I. 590, 30 Atl. 470, 26 L. R. A. 232 (though not entitled to administer thereon).

⁴⁹ *In re Coleman's Estate*, 4 Pa. Dist. R. 105.

codicil,⁵⁰ or the mortgagee of a devisee who has foreclosed and bought in the latter's interest,⁵¹ or the testator's widow,⁵² or the state, where the testator left no heirs, under a statute providing for escheat to the state under such circumstances.⁵³ But a child not named in the will, who takes the same portion of the estate as if the decedent had died intestate is not interested so as to enable him to contest the will;⁵⁴ neither is an executor and trustee who declines to qualify as such;⁵⁵ nor the grantee of a remainder contingent upon no will's being made;⁵⁶ nor the receiver, in supplementary proceedings, of a husband whose wife's will deprives him of all interest in her estate;⁵⁷ nor a public administrator, whose only interest is in the fees of administration;⁵⁸ nor a contingent legatee, who is not otherwise interested in the estate;⁵⁹ nor an alien incapable of inheriting;⁶⁰ nor one who is only a creditor of the decedent.⁶¹ So a party, unfavorably affected by one item of a will, cannot object thereto, where, in event of its invalidity, the property mentioned therein is disposed of by another clause.⁶²

It has been held that a widow, who is an heir at law of the deceased testator, may contest the probate of his will, though she

⁵⁰ *In re Coryell's Will*, 4 App. Div. 429, 39 N. Y. Supp. 508; *Watson v. Alderson*, 146 Mo. 333, 48 S. W. 478, 69 Am. St. Rep. 615.

⁵¹ *Mushrush v. Thompson*, 21 Pa. Co. Ct. R. 566.

⁵² *Dexter v. Codman*, 148 Mass. 421, 19 N. E. 517; *Moyses v. Nellson*, 7 Ohio N. P. 607; *Freeman v. Freeman*, 61 W. Va. 682, 57 S. E. 292, 11 Ann. Cas. 1013.

⁵³ *State v. District Court*, 25 Mont. 355, 65 Pac. 120; *State v. Lancaster* (1907) 119 Tenn. 638, 105 S. W. 858, 14 L. R. A. (N. S.) 991, 14 Ann. Cas. 953. *Contra*: *Hopf v. State*, 72 Tex. 281, 10 S. W. 589.

⁵⁴ *McIntire v. McIntire*, 64 N. H. 609, 15 Atl. 218. So with one who takes more under the will than he would as heir. *Biles v. Dean* (Miss.) 14 South. 536.

⁵⁵ *Campbell v. Campbell*, 130 Ill. 466, 22 N. E. 620, 6 L. R. A. 167.

⁵⁶ *McDonald v. White*, 130 Ill. 493, 22 N. E. 599 (on the ground that the right to contest is not assignable).

⁵⁷ *In re Brown*, 47 Hun, 360.

⁵⁸ *In re Sanborn's Estate*, 98 Cal. 103, 32 Pac. 865; *In re Hickman's Estate*, 101 Cal. 609, 36 Pac. 118; *State v. District Court*, 34 Mont. 226, 85 Pac. 1022.

⁵⁹ *In re Ruppaner*, 15 Misc. Rep. 654, 37 N. Y. Supp. 429.

Nor an attorney to whom a percentage of what he might obtain for his client by a contest of the will was assigned. *In re Evans' Will*, 171 N. Y. 645, 63 N. E. 1116; nor the relatives of a disinherited heir. *Middleditch v. Williams*, 47 N. J. Eq. 585, 21 Atl. 290.

⁶⁰ *Jele v. Lemberger*, 163 Ill. 338, 45 N. E. 279.

⁶¹ *Montgomery v. Foster*, 91 Ala. 613, 8 South. 349; *Hooks v. Brown*, 125 Ga. 122, 53 S. E. 583.

⁶² *Barkley v. Donnelly*, 112 Mo. 561, 19 S. W. 305; *Crerar v. Williams*, 145 Ill. 625, 34 N. E. 467, 21 L. R. A. 454.

would receive more under the will than as heir;⁶⁸ and a bequest offending the statute forbidding a testator having husband, wife, child, or parent to give to charity more than one-half of his estate affords any person who would derive benefit from the estate ground of contest, though not one of the relatives designated.⁶⁴ In Illinois, the right to contest is not assignable;⁶⁵ neither does it pass to the heir or administrator of a person having such right,⁶⁶ but the weight of authority favors the survival of the right to contest the validity of a will.⁶⁷

So it seems that persons having the first right to act as administrators in event of intestacy may contest a will appointing an executor, even though their interests are not affected adversely by the will.⁶⁸

A contestant must, in his application for permission to contest, set forth facts disclosing his interest. The mere allegation that he is "interested" or "would have been an heir or distributee of the estate" is not enough, as being a mere conclusion of law.⁶⁹

Estoppel of Parties

Parties may be estopped by their conduct from asserting the right they might otherwise have to contest the will, as by the acceptance and retention of a legacy thereunder,⁷⁰ and such acceptance and retention estops, although legatee accepts under a protest that will is invalid.⁷¹ So an estoppel may be effected by a former judgment in favor of the will to which the petitioners were parties,⁷² or by an agreement between ancestor and heir that the latter will

⁶⁸ In re Benton's Estate, 131 Cal. 472, 63 Pac. 775; Dexter v. Codman, 148 Mass. 421, 19 N. E. 517. See Murphy's Ex'r v. Murphy (Ky.) 65 S. W. 165. Compare, Fallon's Will, 107 Iowa, 120, 77 N. W. 575.

⁶⁴ Jones v. Kelly, 170 N. Y. 401, 63 N. E. 443, affirming 63 App. Div. 614, 72 N. Y. Supp. 24.

A contrary holding occurred in Frazer v. Hoguet, 65 App. Div. 192, 72 N. Y. Supp. 840.

⁶⁵ McDonald v. White, 130 Ill. 493, 22 N. E. 599.

⁶⁶ Selden v. Illinois Trust & Savings Bank, 239 Ill. 67, 87 N. E. 860, 130 Am. St. Rep. 180; Storrs v. St. Luke's Hospital, 180 Ill. 368, 54 N. E. 185, 72 Am. St. Rep. 211.

⁶⁷ Rainey v. Ridgway, 148 Ala. 524, 41 South. 632; Ingersoll v. Gourley, 78 Wash. 406, 139 Pac. 207, Ann. Cas. 1915D, 570.

⁶⁸ Watson v. Alderson, 146 Mo. 333, 48 S. W. 478, 69 Am. St. Rep. 615; Middleditch v. Williams, 47 N. J. Eq. 585, 21 Atl. 290.

⁶⁹ Montgomery v. Foster, 91 Ala. 613, 8 South. 349.

⁷⁰ In re Soule, 1 Con. Sur. 18, 3 N. Y. Supp. 259, 22 Abb. N. C. 236; Andrews v. Andrews, 110 Ill. 223; Kasey v. Fidelity Trust Co. (1909) 131 Ky. 604, 115 S. W. 737; Utermehle v. Norment, 197 U. S. 40, 25 Sup. Ct. 291, 49 L. Ed. 655, 3 Ann. Cas. 520.

⁷¹ Stone v. Cook, 179 Mo. 534, 78 S. W. 801, 64 L. R. A. 287.

⁷² Reichard v. Izer, 95 Md. 451, 52 Atl. 592.

not contest any disposition of property made by the former,⁷³ or between heirs that they will not contest the will,⁷⁴ or by a release of all interest in the property of which an ancestor might die seised,⁷⁵ or by unexplained laches in asserting the invalidity of the will.⁷⁶ But no estoppel results from the suit of a disinherited heir, to recover for services rendered, prosecuted to judgment against the executor;⁷⁷ nor from the receipt of property from an executor bequeathed to the legatee, where the same property has been given to the same legatee by a prior will under which she claims;⁷⁸ nor from the mere fact that the contestants were parties to the probate proceedings.⁷⁹ The fact that an heir consented to a decree probating the will does not estop him later from attacking the validity of the will,⁸⁰ and one who accepts a beneficial interest under a will is not precluded from asserting that a clause therein is void for remoteness.⁸¹

Limitation upon Actions

The period within which actions may be brought to contest a will admitted to probate is regulated by statute, varying from three years in Pennsylvania⁸² to one in California.⁸³ It is sometimes held that the right to contest a will on the ground of fraud is not affected by statutes of this character.⁸⁴ But more commonly the probate becomes absolutely conclusive at the end of the statutory period,⁸⁵ and the parties are not permitted by consent to give the court jurisdiction of a will contest barred by limitations.⁸⁶ The

⁷³ *In re Garcelon's Estate*, 104 Cal. 570, 38 Pac. 414, 32 L. R. A. 595, 43 Am. St. Rep. 134.

⁷⁴ *Reichard v. Izer*, 95 Md. 451, 52 Atl. 592. And the executor may set up such a contract, although not a party thereto.

⁷⁵ *Elssler v. Hoppel*, 158 Ind. 82, 62 N. E. 692.

⁷⁶ *Knight v. Hollings*, 73 N. H. 495, 63 Atl. 88; *Boyer v. Decker*, 5 App. Div. 623, 40 N. Y. Supp. 469.

The fact that contestant, with full knowledge of proceedings, gave no notice of his intention to contest while estate was being administered and property sold, does not create an estoppel. *Foley v. O'Donaghue*, 167 Ind. 134, 77 N. E. 352.

⁷⁷ *Roberts v. Abbott*, 127 Ind. 83, 26 N. E. 565.

⁷⁸ *Kosteletzky v. Scherhart*, 99 Iowa, 120, 68 N. W. 591.

⁷⁹ *Gueydan v. Montagne*, 109 La. 38, 33 South. 61; *In re Soule*, 46 Hun, 661.

⁸⁰ *Shea v. Bergen*, 59 Misc. Rep. 294, 110 N. Y. Supp. 572.

⁸¹ *Schuknecht v. Schultz*, 212 Ill. 43, 72 N. E. 37.

⁸² *Stewart's Purdon's Dig.* 1905, vol. 1, p. 1072.

⁸³ *In re Maxwell's Estate*, 74 Cal. 384, 16 Pac. 206.

⁸⁴ *Goodell v. Pike*, 40 Vt. 319.

⁸⁵ 1 *Woerner, Law of Administration*, 499; *In re Maxwell's Estate*, 74 Cal. 384, 16 Pac. 206; *Luther v. Luther*, 122 Ill. 558, 13 N. E. 166.

⁸⁶ *Meyer v. Henderson*, 88 Md. 585, 41 Atl. 1073, 42 Atl. 241.

usual exceptions in favor of parties under disability at the time of probate are generally made.

The statute of limitations in force at the time when the action to contest the will is begun controls, and not that in force when the will was probated.⁸⁷

Trial by Jury

A jury trial in a proceeding to contest a will is not a matter of right,⁸⁸ but is granted in most jurisdictions by reason of statutory provisions or established usage. In some states, either party may have a jury trial on demand;⁸⁹ in others, the court may call in a jury to aid it in determining disputed questions of fact, though the findings of the jury are not binding upon the court;⁹⁰ and in still others this form of trial is mandatory.⁹¹ But in the latter case the issue need not be submitted to the jury if the court takes the view that, as a matter of law, there is no evidence sufficient to that end.⁹²

Right to Open and Close

Applying the usual rule that the party who has the burden of establishing an issue has the right to open and close, it results that ordinarily the proponents of the will have this right, and there are occasionally statutes to this effect.⁹³ But where all the requisites of a statutory will are admitted, and the contest is solely on the ground of undue influence, the contestant is entitled to open and close, as the burden of establishing this issue is upon him.⁹⁴ But when there are a number of issues, including the alleged exercise of undue influence, and the burden of establishing any one of them, as due execution of the will or testamentary capacity, is upon the pro-

⁸⁷ *Storrs v. St. Luke's Hospital*, 180 Ill. 368, 54 N. E. 185, 72 Am. St. Rep. 211.

⁸⁸ *Cummins v. Cummins*, 1 Marv. (Del.) 423, 31 Atl. 816; *Duffield v. Walden*, 102 Iowa, 676, 679, 72 N. W. 278; *Rich v. Bowker*, 25 Kan. 7; *Mueller v. Pew*, 127 Wis. 288, 106 N. W. 840.

⁸⁹ Code Iowa 1873, § 2340, as amended by Acts 16th Gen. Assem. p. 8, c. 11 (construed in *Smith v. James*, 74 Iowa, 462, 38 N. W. 160).

⁹⁰ *Medill v. Snyder*, 61 Kan. 15, 58 Pac. 962, 78 Am. St. Rep. 307; *Jones' Will*, 96 Wis. 427, 70 N. W. 685, 71 N. W. 883.

⁹¹ *Walker v. Walker*, 14 Ohio St. 157, 82 Am. Dec. 474.

⁹² *Phillips v. Phillips*, 77 App. Div. 113, 78 N. Y. Supp. 1001, construing Code Civ. Proc. § 2653a.

⁹³ *Appeal of Livingston*, 63 Conn. 68, 26 Atl. 470; *Rich v. Lemmon*, 15 App. D. C. 507; *Taylor v. Cox*, 153 Ill. 220, 38 N. E. 656; *Bevelot v. Lestrade*, 153 Ill. 625, 38 N. E. 1056; *King v. King* (Ky.) 42 S. W. 347; *Teckenbroch v. McLaughlin*, 209 Mo. 533, 108 S. W. 46; *Patten v. Cilley*, 67 N. H. 520, 42 Atl. 47; *Ex parte Brock*, 37 S. C. 348, 16 S. E. 38; *Gable v. Rauch*, 50 S. C. 95, 27 S. E. 555.

Contra: *Blume v. Hartman*, 115 Pa. 32, 8 Atl. 219, 2 Am. St. Rep. 525.

⁹⁴ *Patten v. Cilley* (C. C.) 46 Fed. 892; *Moore v. Allen*, 5 Ind. 521.

ponent, he then may open and close; ⁹⁵ as is also the case when the will propounded is contested on the ground that a subsequent will was executed, for the last will of a testator is his valid will, and this fact, of course, the proponents must show. ⁹⁶ So a rule of court requiring the opponents of a will, admitted to probate by the probate court, on appeal to file in the appellate court the reasons of appeal, does not change the burden of proof so as to entitle the opponents to open and close. ⁹⁷

Evidence in Probate Trials

The principal rules of evidence, as applied in probate trials, have already been stated in other connections. The common-law doctrines regarding the competency of witnesses, as modified by statute, prevail here as elsewhere. The statutes, quite generally enacted, which disqualify the adverse party from testifying in actions to which a personal representative is a party, except under certain circumstances, apply in contests over the validity of wills. ⁹⁸ The terms of these statutes vary largely, and their interpretation presents no controlling principles of general significance.

It not infrequently happens that the attorney, physician, or clergyman of the testator acts as subscribing witness to the will. Communications made to the first are of course privileged at common law, while those made to the other two are occasionally, and with doubtful propriety, made so by statute. By the weight of authority, this privilege does not extend to statements made to such persons, who act as subscribing witnesses, or to information obtained by them while acting in this capacity. ⁹⁹ In a proceeding to contest a will, it is generally agreed that the privilege which was formerly that of testator may be waived by his executor, heir, next of kin, or by a legatee. ¹

⁹⁵ Rich v. Lemmon, 15 App. D. C. 507.

⁹⁶ McCutchen v. Loggins, 109 Ala. 457, 19 South. 810; McBee v. Bowman, 89 Tenn. 132, 14 S. W. 481. Contra: Rogers v. Diamond, 13 Ark. 474.

When a will is contested on the ground that an earlier will is the true will of the testator, it is said to be discretionary with the court as to which party shall open and close. Bardell v. Brady, 172 Ill. 420, 50 N. E. 124.

⁹⁷ Appeal of Livingston, 63 Conn. 68, 26 Atl. 470.

⁹⁸ In many jurisdictions, however, no such disqualification exists.

⁹⁹ O'Brien v. Spalding, 102 Ga. 490, 31 S. E. 100, 66 Am. St. Rep. 202; McMaster v. Scriven, 85 Wis. 162, 55 N. W. 149, 39 Am. St. Rep. 828; Kern v. Kern, 154 Ind. 29, 55 N. E. 1004 (the reason, however, given for this decision that the rule regarding the testimony of an attorney applies only during the client's lifetime, is hardly in accord with the usual view); In re Coleman's Will, 111 N. Y. 220, 19 N. E. 71; Wigmore on Ev. §§ 2314, 2315.

¹ Winters v. Winters, 102 Iowa, 53, 71 N. W. 184, 63 Am. St. Rep. 428; Wigmore on Ev. § 2329, and cases there cited.

PROCEDURE IN PROBATE PROCEEDINGS

96. In probate proceedings, the principal formal steps in procedure are:

- (a) The filing of a petition for the probate of the will.
- (b) The serving of notice of this fact upon the parties interested.
- (c) Pleadings of some sort by the opponents of the will, in event of its allowance by the probate court.

While it is not always necessary to file a written petition for the probate of a will, an oral motion, accompanied by the presentation of the proposed instrument being enough,² yet such petition is usually required by statute. This petition is not a very formal document, though printed blanks are sometimes provided for this purpose, and when so provided should be used.³ This petition should set forth the interest of proponent and the other facts required to give the court jurisdiction,⁴ such as the testator's death,⁵ though a reference to him as the "deceased" is enough,⁶ and his domicile in the county in whose probate court the petition is filed,⁷ and, in the case of a nuncupative will, that the words were uttered during the last sickness of the deceased.⁸

Testamentary capacity of the deceased need not be alleged in the petition.⁹

Notice

While such is not always the case,¹⁰ yet a notice of the filing of the petition, or a citation of the parties interested, is usually requir-

² *Small v. McCalley*, 51 Ala. 527; *Miller v. Coulter*, 156 Ind. 290, 59 N. E. 853; *Peirce's Estate* (1911) 63 Wash. 437, 115 Pac. 835.

³ This, however, is more for convenience in keeping the records of the probate office than for any other purpose.

⁴ *Lucas v. Todd*, 28 Cal. 186.

The better practice is also to set forth in the petition the names, description, and residence of those who would be entitled to the estate as heirs and distributees. *Boyett v. Kerr*, 7 Ala. 15.

⁵ An error as to the date of this event is, however, usually unimportant. *Davis v. Miller*, 106 Ala. 154, 17 South. 323.

⁶ *Bradshaw v. Roberts* (Tex. Civ. App.) 52 S. W. 574.

⁷ *McDonnell v. Farrow*, 132 Ala. 227, 31 South. 475. See *Higgins v. Nethery*, 30 Wash. 239, 70 Pac. 489.

⁸ *Martinez v. De Martinez*, 19 Tex. Civ. App. 601, 48 S. W. 532.

⁹ *Hathaway's Appeal*, 46 Mich. 326, 9 N. W. 435; *Lindemann v. Dobossy* (1908, Tex. Civ. App.) 107 S. W. 111.

¹⁰ See *Malone v. Cornelius*, 34 Or. 192, 55 Pac. 536, holding that under the statute of that state no notice of any kind was necessary; the proceeding to probate the will being purely ex parte, and accomplished by a duly verified

ed by statute. This is served either personally upon such parties, or by publication in a newspaper, or by posting in one or more public places. The form of the citation is largely regulated by statute, but its most material element is a definite statement as to the time and place of the hearing on the petition,¹¹ and this is necessary to bind interested parties who do not assent to the subsequent proceedings.¹² Proceedings, however, of which due notice is not given, are valid as to persons actually appearing.¹³ If due citation in every particular is not had, the decree ordering probate may be set aside by parties not duly cited and not appearing.¹⁴ An error in the name of one of the parties upon whom notice was served, of such a character that it could not have misled her, does not affect the validity of the notice.¹⁵ Recitals in the order admitting the will to probate that due notice had been given and citations issued and served as required by previous orders of the court warrant the presumption that orders had been made directing the issuing of citations as required by statute,¹⁶ particularly when a long time has elapsed subsequent to the probate.¹⁷ The fact that the hearing was two weeks later than the time fixed therefor by the published notice does not affect the validity of the probate,¹⁸ nor does the fact that proof of due publication of notice was made subsequent to such time.¹⁹ The

petition, followed by proof of execution. See *Bent v. Thompson*, 5 N. M. 408, 23 Pac. 234, affirmed in 138 U. S. 114, 11 Sup. Ct. 238, 34 L. Ed. 902.

No notice is necessary where probate in common form is permitted. *Hooks v. Brown*, 125 Ga. 122, 53 S. E. 583.

¹¹ *Beckett v. Selover*, 7 Cal. 234, 68 Am. Dec. 237.

Unless statute requires personal service, notice by publication is sufficient, even though persons entitled to notice reside within county where petition for probate is made. *Sleker's Estate* (1911) 89 Neb. 216, 131 N. W. 204, 35 L. R. A. (N. S.) 1058.

¹² *Heminway v. Reynolds*, 98 Wis. 501, 74 N. W. 350. Here the order of the court fixed Saturday, July 3d, as the day for the hearing, which was held on Friday, July 3d. There was no clear proof as to the contents of the published notice. Held insufficient proof that proper notice was given of the day of hearing.

¹³ *Flood v. Kerwin*, 113 Wis. 673, 89 N. W. 845.

¹⁴ *Herring v. Ricketts*, 101 Ala. 340, 13 South. 502; *In re Dates*, 58 Hun, 608, 12 N. Y. Supp. 205; *Duperier v. Bervard*, 107 La. 91, 31 South. 653; *O'Callaghan v. O'Brien* (C. C.) 116 Fed. 934.

Notice to an executor who declines the trust is not constructive notice to the beneficiaries, as he does not represent them. *Feuchter v. Keyl*, 48 Ohio St. 357, 27 N. E. 860.

¹⁵ *In re Hamilton's Estate*, 120 Cal. 421, 52 Pac. 708 (where the name "Helen" was used instead of "Ellen").

¹⁶ *Moore v. Earl*, 91 Cal. 632, 27 Pac. 1087.

¹⁷ *Portz v. Schantz*, 70 Wis. 497, 36 N. W. 249.

¹⁸ *Field v. Log Driving Co.*, 67 Wis. 569, 31 N. W. 17.

¹⁹ *Roberts v. Flanagan*, 21 Neb. 503, 32 N. W. 563.

failure properly to serve notice on some of the necessary parties does not necessitate the publication of a new notice, but the hearing may be postponed for the additional service required.²⁰

The contestant in the probate of a will cannot take advantage of the failure to cite certain of the next of kin,²¹ neither can the testator's debtors.²²

Pleadings

When the validity of a will is contested, there must be something in the nature of pleadings by the contestant to raise the necessary issue. The form is determined by statute. It is ordinarily a petition or complaint.²³ The contestant's pleading must ordinarily set forth clearly and concisely the objections to the probate relied upon, and he is confined at the trial to the matters therein alleged. Thus where there were no allegations that the will was not properly signed and attested, a verdict for the contestant cannot be sustained on evidence tending to prove that such was the case.²⁴ Ordinarily the pleading must be so drawn that it would withstand a demurrer in a common-law proceeding. Thus an averment that a will was procured by the proponent's falsely representing to the testatrix that he was her lawful husband, when in fact he was not, is insufficient, in the absence of an averment that she was deceived thereby.²⁵ So a general averment that a will was procured by fraud and undue influence is inadequate, since here the facts must be averred with some degree of particularity.²⁶ But matters of proof, such as confidential relations between the testatrix and the beneficiaries, need not be alleged in a proper plea of undue influence,²⁷ nor, of course, in any other plea. An averment that the testator, when making the

²⁰ *Curtis v. Underwood*, 101 Cal. 661, 36 Pac. 110.

²¹ *Reese v. Nolan*, 99 Ala. 203, 13 South. 677.

²² *Rice v. Hosking*, 105 Mich. 303, 63 N. W. 311, 55 Am. St. Rep. 448.

²³ See *Lange v. Dammler*, 119 Ind. 567, 21 N. E. 749; *Summers v. Copeland*, 125 Ind. 466, 25 N. E. 555.

²⁴ *Purdy v. Hall*, 134 Ill. 298, 25 N. E. 645.

So evidence is inadmissible to show that the will was signed by the testator's wife, and not by him, when this fact was not alleged in the petition for contest. *Wood v. Carpenter*, 166 Mo. 465, 66 S. W. 172.

²⁵ *Moore v. Heineke*, 119 Ala. 627, 24 South. 374.

²⁶ *In re Sheppard*, 149 Cal. 219, 85 Pac. 312; *Story v. Story*, 188 Mo. 110, 86 S. W. 225; *BARKSDALE v. DAVIS*, 114 Ala. 623, 22 South. 17, *Dunmore Cas. Wills*, 181.

But an averment that the testatrix was under the domination and control of specified persons, and that the will was the result of undue influence exercised by them over the mind of the testator, is apparently sufficient. *Coghill v. Kennedy*, 119 Ala. 641, 24 South. 459. And see *National Safe Deposit, Savings & Trust Co. v. Sweeney*, 3 App. D. C. 401.

²⁷ *Coghill v. Kennedy*, 119 Ala. 641, 24 South. 459.

will, was of unsound mind is sufficient,²⁸ as is also the allegation that "the said will was unduly executed," on demurrer, though followed by a statement of facts insufficient to avoid the will.²⁹ Deceit need not be alleged in a plea of undue influence.³⁰

Any number of objections to the validity of the will may be alleged, and the contestant need not elect between them, even though they are all contained in the same paragraph.³¹ In jurisdictions where the issue in testamentary contests is fixed by statute, and where it is substantially the common-law issue *devisavit vel non*, most of the preceding discussion has little application. Here the petition for contest need not allege specific grounds, but it is sufficient to assign as the only ground of appeal that the "instrument was not the last will and testament of the said deceased."³²

Framing Issues for the Jury

Where the right of trial by jury is secured by statute in will contests, the issue between the parties is framed for the determination of that body. In some jurisdictions the question of the submission of an issue to the jury is determined in the first instance by the probate court after hearing the evidence. In such cases, if the evidence is not sufficient to sustain a verdict against the will³³ or for it,³⁴ the issue will be refused. And when the petition attacking the will assails the will in its entirety on the ground of undue influence, an issue is properly refused as to what portion of the will was thus improperly procured.³⁵

Regardless of where the issue originates, the precise point at issue, and that only, should be submitted to the jury. Thus, in a contest over a will and nine codicils, where the parties are agreed as to the status of the will and the first two codicils, it is improper to submit to the jury an issue requiring them to pass on all the papers.³⁶ So it is error to submit to a jury an issue presenting a question of law.³⁷ Pending the trial of an issue as to the opponent's right to

²⁸ *Moore v. Heineke*, 119 Ala. 627, 24 South. 374; *Kilborn's Estate*, 158 Cal. 593, 112 Pac. 52.

²⁹ *Wenning v. Teeple*, 144 Ind. 189, 41 N. E. 600.

³⁰ *Coghill v. Kennedy*, 119 Ala. 641, 24 South. 459. Such a plea includes fraud.

³¹ *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 336.

³² *Lane v. Hill*, 68 N. H. 275, 44 Atl. 393, 73 Am. St. Rep. 591. See, also, *Dew v. Reid*, 52 Ohio St. 519, 40 N. E. 718.

³³ *Herster v. Herster*, 122 Pa. 239, 16 Atl. 342, 9 Am. St. Rep. 95; *In re Hoyt's Estate*, 10 Kulp (Pa.) 166; *In re Hemingway's Estate*, 7 North. Co. R. (Pa.) 93; *In re Rowson's Estate*, 175 Pa. 150, 34 Atl. 433; *Sharpless' Estate*, 134 Pa. 250, 19 Atl. 630.

³⁴ *Appeal of Murdy*, 123 Pa. 464, 16 Atl. 483.

³⁵ *Gross v. Burneston*, 91 Md. 383, 46 Atl. 993.

³⁶ *Ward v. Poor*, 94 Md. 133, 50 Atl. 572.

³⁷ *Id.*

contest the will, new issues cannot be submitted involving the validity of the will, and a judgment based on a verdict found on such issues is invalid.³⁸ The issue should involve ultimate facts alone, and not mere evidentiary facts.³⁹ Hence the issues, "Were the papers found among the valuable papers of the deceased?" "Are they in his handwriting?" "Did he intend them to be his last will and testament?" were improperly tendered, and should be refused.⁴⁰ So, also, the same question should not be presented in different issues.⁴¹ No issue should be allowed when it may be rendered immaterial by the determination of a collateral fact, such as the adoption by the testatrix of the sole legatee, who, if lawfully adopted, would take the entire property even if the will were disallowed.⁴² Where the statutory issue was *devisavit vel non*, it is held that a question not germane to the issue is presented where the plaintiff seeks to have probate annulled because, though an only child, he was not mentioned in the will, and that the trial court should not have passed upon it.⁴³ Questions containing different issues should be answered separately by the jury.⁴⁴ A stipulation for the submission of issues to the jury, and that a decree shall be entered in accordance with the findings, subject to the right of appeal, is valid and binding.⁴⁵

Verdict or Judgment

The form of the verdict and of the judgment to be entered thereon is frequently regulated by statute. In such cases the provisions of the statute must be strictly followed. Thus, where a statute provided that, if a will is found to be invalid, probate must be annulled, and, after a finding by the jury that the will was void for lack of

³⁸ *Meyer v. Henderson*, 88 Md. 585, 41 Atl. 1073, 42 Atl. 241.

³⁹ *In re Benton's Estate*, 131 Cal. 472, 63 Pac. 775.

⁴⁰ *Cornellius v. Brawley*, 109 N. C. 542, 14 S. E. 78.

⁴¹ *Keebler v. Shute*, 183 Pa. 283, 38 Atl. 586.

Thus, where the issue submitted was whether decedent "was of sound and disposing mind, and capable of executing a valid deed or contract," a second issue as to whether decedent was "under the influence of any insane mental hallucination, insane delusion, or insane delusion which rendered him incapable of making a valid will," should be refused. *National Safe Deposit, Sav. & Trust Co. v. Sweeney*, 3 App. D. C. 401. It may be doubted, however, whether the first issue was properly submitted.

⁴² *Fiske v. Pratt*, 157 Mass. 83, 31 N. E. 715.

⁴³ *Cox v. Cox*, 101 Mo. 168, 13 S. W. 1055, overruling *Kenrick v. Cole*, 61 Mo. 572.

Where the issue is *devisavit vel non*, the question of whether the will was properly or improperly admitted to probate is not involved. *Stacey v. Cunningham*, 69 Ohio St. 176, 68 N. E. 1001.

⁴⁴ *Keebler v. Shute*, 183 Pa. 283, 38 Atl. 586.

⁴⁵ *Beyer v. Le Fevre*, 186 U. S. 114, 22 Sup. Ct. 765, 46 L. Ed. 1080.

testamentary capacity and undue influence, judgment was rendered annulling the will as to the contestant, and decreeing that she should take as though decedent had died intestate, the judgment was held void.⁴⁶ And a decree is erroneous which declares the whole will invalid as to certain heirs and valid as to others.⁴⁷ Sometimes the verdict on the issue as to whether the writing was a will is made final by statute, in which case no formal judgment need be entered.⁴⁸ The court may direct a verdict in favor of either party⁴⁹ but only when the evidence is wholly insufficient to justify a verdict for the other party.⁵⁰

As a rule the verdict need take no particular form so long as it is responsive to the issue,⁵¹ and it is sometimes held that where the will is assailed on several grounds the verdict for the contestant need not disclose upon which of the grounds it is based.⁵² Where fraud is defined as acts committed "with intent to deceive another," a finding in a will contest that the testator was controlled solely by representations of the proponent, which were false and fraudulent, is not sufficiently responsive to the issue, there being no finding that they were made "with intent to deceive" the testator,⁵³ and a judgment on such a finding will be reversed.⁵⁴ If the court frames the form of a verdict, including propositions not in controversy, no error results if the jury is instructed to find only on disputed questions.⁵⁵ Where a will and two codicils are written on the same paper, the codicils need not be mentioned separately in a verdict sustaining the will.⁵⁶ Although special findings usually control a general verdict in case of inconsistency,⁵⁷ where there is a general verdict that a will was void, but the special verdict was partially favor-

⁴⁶ *In re Freud's Estate*, 73 Cal. 555, 15 Pac. 135.

⁴⁷ *McCann v. Ellis* (1911) 172 Ala. 60, 53 South. 303.

⁴⁸ *Gordon v. Burris*, 141 Mo. 602, 43 S. W. 642.

⁴⁹ *Carey's Estate*, 58 Colo. 77, 136 Pac. 1175, 51 L. R. A. (N. S.) 927, Ann. Cas. 1915B, 951; *Sevening v. Smith* (1912) 153 Iowa, 639, 133 N. W. 1081; *Teckenbroch v. McLaughlin*, 209 Mo. 533, 108 S. W. 46.

⁵⁰ *Thompson v. Bennett*, 194 Ill. 57, 62 N. E. 321; *In re Claffin's Will*, 73 Vt. 129, 50 Atl. 815, 87 Am. St. Rep. 693.

⁵¹ *Bledsoe's Ex'x v. Bledsoe* (Ky.) 1 S. W. 10, holding that, where the validity of a will was involved, the verdict, "We, the jury, find this not to be the will of the testator, Samuel Bledsoe," written on the back of one of the judge's instructions, and signed by the foreman, was sufficiently responsive.

⁵² *Underwood v. Thurman*, 111 Ga. 325, 36 S. E. 788.

⁵³ *In re Benton's Estate*, 131 Cal. 472, 63 Pac. 775.

⁵⁴ *Id.*

⁵⁵ *Adams v. Rodman*, 102 Wis. 456, 78 N. W. 588, 759.

⁵⁶ *Wilson v. Hays' Ex'r*, 109 Ky. 321, 58 S. W. 773. The findings of the jury must not be actually inconsistent, however. *Gwin v. Gwin*, 5 Idaho, 271, 48 Pac. 295.

⁵⁷ *Gwin v. Gwin*, 5 Idaho, 271, 48 Pac. 295.

able to the proponent, the general verdict will stand if, in view of all the facts, the apparent inconsistency disappears.⁵⁸ And where a verdict in a will contest is merely advisory, irregularities in its form do not afford grounds for reversal.⁵⁹ Irregularities in the form of a verdict in accordance with the terms of a stipulation, which do not affect the substantial rights of the parties, may be disregarded.⁶⁰

Judgment must be entered on the verdict of the jury, must conform thereto, and must relate to no matter foreign to the proceedings as a result of which the verdict was rendered.⁶¹ An agreement made by the parties in a contest over a will, by which their rights are determined, may be adopted as the judgment of the court.⁶² But a proceeding by which, on agreement of the parties interested, the court can modify the terms of a will is sometimes regulated by statute, in which case the requirements of the statute must be strictly complied with.⁶³ Where, in a contest to set aside a will, the contestants succeed, a decree, setting aside the probate proceedings and declaring them null and void, is proper.⁶⁴

Appeal, Error and New Trial

After the trial of any issue involving the validity of a will has been had by a jury or by the court to which an appeal lies from the decision of the probate court, appeals are usually provided for by statute, as in the case of other causes. Such appeal may be taken by any of the parties to the proceeding appealed from, who regard themselves aggrieved thereby.⁶⁵ There are ordinarily limitations upon the time within which such appeals may be prosecuted,⁶⁶ and

⁵⁸ Orchardson v. Coffield, 171 Ill. 14, 49 N. E. 197, 40 L. R. A. 256, 63 Am. St. Rep. 211.

⁵⁹ Adams v. Rodman, 102 Wis. 456, 78 N. W. 588, 759.

⁶⁰ King v. Ponton, 82 Cal. 420, 22 Pac. 1087.

⁶¹ Woodruff v. Hundley, 127 Ala. 640, 29 South. 98, 85 Am. St. Rep. 145, holding that, where a verdict was rendered sustaining the will, a motion by the contestant that the court omit from the judgment certain provisions of the will as being void for uncertainty, and as not constituting a valid charitable trust, was properly refused.

So where the only issue raised by the pleadings and passed upon by the jury was as to the forgery of a second will, and the issue is found for the contestants, the court properly refused to establish a prior will, alleged to have been lost. McDonald v. McDonald, 142 Ind. 55, 41 N. E. 336.

⁶² Worthington's Ex'rs v. Worthington's Devisees (Ky.) 35 S. W. 1039; Wilkins v. Hukill, 115 Mich. 594, 73 N. W. 898.

⁶³ Elder v. Adams, 180 Mass. 303, 62 N. E. 373. See Bartlett v. Slater, 182 Mass. 208, 65 N. E. 73.

⁶⁴ Moyer v. Swygart, 125 Ill. 262, 17 N. E. 450.

⁶⁵ See Hesterberg v. Clark, 166 Ill. 241, 46 N. E. 734, 57 Am. St. Rep. 135; In re Butler's Will, 110 Wis. 70, 85 N. W. 678.

⁶⁶ Duff v. Duff, 103 Ky. 348, 45 S. W. 102.

the customary provisions are made for the giving of bonds by the appellant.

When no right of appeal is granted by statute, any party aggrieved is usually given the right to prosecute error proceedings.⁶⁷

New trials may be granted by the trial court in proceedings to establish a will, as in other civil causes,⁶⁸ the matter being largely discretionary with the trial judge.⁶⁹

When the question as to the correctness of the verdict, in view of the evidence, is raised in an appellate court, the verdict will not be set aside unless there is clearly a legal insufficiency in the evidence to sustain a verdict,⁷⁰ particularly when the trial court has declined to interfere.⁷¹ And it is sometimes said the verdict will not be disturbed on appeal merely as being against the weight of evidence.⁷² But the truer statement is that while the verdict demands careful scrutiny before a conclusion contrary thereto can be reached, yet it has no other effect,⁷³ and it will be set aside when the record shows it to be against the clear preponderance of the evidence.⁷⁴

When the verdict is for the contestants on two issues, judgment will not be reversed for errors in rulings on one of the issues, when the finding on the other is sufficient to sustain it.⁷⁵

Revocation of Probate

Although, in a few jurisdictions, the court admitting a will to probate has no power to revoke the probate,⁷⁶ it is generally held

⁶⁷ See Gen. Code Ohio 1910, § 12086, expressly prohibiting appeals in cases to contest wills, but granting right to prosecute error.

⁶⁸ *Ellis v. Ellis*, 104 Ky. 121, 46 S. W. 521; *Hayes v. Moulton*, 194 Mass. 157, 80 N. E. 215.

⁶⁹ *Wood v. Lane*, 89 Ga. 78, 14 S. E. 901.

⁷⁰ *In re Hoover's Will*, 19 D. C. (8 Mackey) 495; *Smith v. Henline*, 174 Ill. 184, 51 N. E. 227; *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113; *White v. Cole* (Ky.) 47 S. W. 759; *Lischy v. Schrader*, 104 Ky. 657, 47 S. W. 611; *Coates v. Semper*, 82 Minn. 460, 85 N. W. 217; *Crossan v. Crossan*, 169 Mo. 631, 70 S. W. 136; *In re Watson*, 131 N. Y. 587, 30 N. E. 56; *In re Voorhis' Will*, 125 N. Y. 765, 26 N. E. 935; *In re Elmer's Will*, 88 Hun, 290, 34 N. Y. Supp. 406; *Robinson v. Robinson*, 203 Pa. 400, 53 Atl. 253.

⁷¹ *Petefish v. Becker*, 176 Ill. 448, 52 N. E. 71; *In re Allison's Estate*, 104 Iowa, 130, 73 N. W. 489.

⁷² *Moore v. McNulty*, 164 Mo. 111, 64 S. W. 159.

⁷³ *Schuchhardt v. Schuchhardt*, 62 N. J. Eq. 710, 49 Atl. 485.

⁷⁴ *Bradley v. Palmer*, 193 Ill. 15, 61 N. E. 856.

⁷⁵ *Putt v. Putt*, 149 Ind. 30, 48 N. E. 356, 51 N. E. 337.

So, when one of two findings is supported by the evidence, and the other is not, the latter fact is no ground for reversal. *In re Fenton's Will*, 97 Iowa, 192, 66 N. W. 99; *Staser v. Hogan*, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990.

⁷⁶ *Delehanty v. Pitkin*, 76 Conn. 412, 56 Atl. 881; *Butt's Estate*, 173 Mich. 504, 139 N. W. 244; *McAndrew's Estate*, 206 Pa. 366, 55 Atl. 1040; *Beatty's Estate*, 193 Pa. 304, 45 Atl. 1057.

that, even when no contest is made at the original hearing, or when no appeal is taken from the decree allowing probate, the power to revoke exists in the probate court itself in all cases where the court acted without jurisdiction, without notice when notice is required by statute, or in disregard of any statutory requirement.⁷⁷ So, also, where probate is secured by fraud⁷⁸ where a later will is discovered subsequent to the probate of an earlier one.⁷⁹ It is sometimes held that no lapse of time will bar an application for the revocation of the invalid probate of a will, in the court which granted it,⁸⁰ though such application may be barred by laches or estoppel.⁸¹

The power of the probate court to revoke probate is not infrequently regulated by statute.⁸²

A petition to revoke probate may be maintained only by a person interested in the estate of the decedent,⁸³ and one who expressly consents to a decree probating a will, the court having jurisdiction of the subject-matter, cannot thereafter have the decree set aside where no fraud is shown.⁸⁴

While in England the power to revoke probate of a will is exercised by courts of chancery where the probate courts are incapable of

⁷⁷ *Sowell v. Sowell's Adm'r*, 40 Ala. 243; *Roy v. Segrist*, 19 Ala. 810; *Wright v. Simpson*, 200 Ill. 56, 65 N. E. 628; *Waters v. Stickney*, 12 Allen (Mass.) 1, 9, 90 Am. Dec. 122; 1 Woerner, *Law of Administration*, 497.

⁷⁸ *Parsons v. Balson*, 129 Wis. 311, 109 N. W. 136.

⁷⁹ *Waters v. Stickney*, 12 Allen (Mass.) 1, 11, 90 Am. Dec. 122; *Bowen v. Johnson*, 5 R. I. 112, 119, 73 Am. Dec. 49; *Schultz v. Schultz*, 10 Grat. (Va.) 358, 373, 60 Am. Dec. 335; *Vance v. Upson*, 64 Tex. 266; *Gaines v. Hennen*, 24 How. 553, 567, 16 L. Ed. 770.

⁸⁰ *Clagett v. Hawkins*, 11 Md. 381, 387; *Bailey v. Osborn*, 33 Miss. 128.

⁸¹ *Whitaker v. McKinney*, 134 Ala. 326, 32 South. 695, 92 Am. St. Rep. 37 (where, 38 years after the probate, application was made to set aside the decree on the ground that one of the next of kin had no notice of the proceeding); *In re Richardson's Will*, 81 Hun, 425, 30 N. Y. Supp. 1008; *Houston v. Wilcox*, 121 Md. 91, 88 Atl. 32; *Focha v. Focha's Estate*, 8 Cal. App. 576, 97 Pac. 321.

⁸² Code Civ. Proc. N. Y. § 2481, subd. 6, may be taken as an illustration; providing that a surrogate has power to open, vacate, or set aside a decree or former order of his court for fraud, newly discovered evidence, or other sufficient cause, and that this power must be exercised only in a like case, and in the same manner as a court of general jurisdiction exercises the same power. Construed, as applied to revocation of probate of wills, in *In re Hamilton*, 2 Con. Sur. 268, 20 N. Y. Supp. 73; *In re Donlon*, 66 Hun, 199, 21 N. Y. Supp. 114; *In re Odell's Estate*, 1 Misc. Rep. 390, 23 N. Y. Supp. 143.

See, also, *Rockwell v. Holden*, 22 R. I. 243, 47 Atl. 543, construing Gen. Laws R. I. 1896, c. 209, § 11.

⁸³ *Peaslee's Will*, 73 Hun, 113, 25 N. Y. Supp. 940.

⁸⁴ *Camplin v. Jackson*, 34 Colo. 447, 83 Pac. 1017. See, however, *Matter of Albert*, 38 Misc. Rep. 61, 76 N. Y. Supp. 965, reaching a different conclusion under New York statute.

affording adequate relief in consequence of fraud or perjury committed in obtaining probate, such power does not exist in the United States unless conferred by statute.⁸⁵

Expunging Libelous Matter

Where a will contains matter which is clearly shown to be libelous, as reflections upon the legitimacy of a grandchild, such matter may be expunged in the probate.⁸⁶ However, the power of the probate court so to expunge has been seriously doubted,⁸⁷ and even where the power exists, it is very sparingly exercised.⁸⁸

EFFECT OF PROBATE

97. Until set aside by direct proceedings to that end, the probate of a will, whether in common or solemn form, is conclusive upon parties to the proceedings and others who have been duly notified thereof, upon questions of testamentary capacity, the absence of fraud or undue influence, and due execution of the instrument. It does not preclude inquiry as to the validity of its provisions or their proper construction, or legal effect.

Although questioned in a few cases,⁸⁹ the proposition as stated in the black-letter text is substantially undisputed, and usually the probate of a will is as conclusive with regard to land devised as it is with regard to personalty.⁹⁰ The function of a probate court is to determine whether the instrument propounded contains the will

⁸⁵ *State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118; *Sharp v. Sharp*, 213 Ill. 332, 72 N. E. 1058; *In re Broderick's Will*, 21 Wall. 503, 22 L. Ed. 599; 1 Woerner, *Law of Administration*, 496; 1 Story, *Eq. Jur.* § 440. And see *Smith v. Boyd*, 127 Mich. 417, 86 N. W. 953.

⁸⁶ *In re Bomar*, 18 N. Y. Supp. 214, 27 Abb. N. C. 425. In this case the legitimacy of the child was fully proved.

⁸⁷ *In re Meyer*, 72 Misc. Rep. 566, 131 N. Y. Supp. 27, 2 Civ. Proc. R. (N. S.) 364.

⁸⁸ *Goods of Honynwood*, L. R. 2 P. & D. 251.

⁸⁹ In the following cases, orders admitting wills to record were held inconclusive: *Fortner v. Wiggins*, 121 Ga. 26, 48 S. E. 694 (where lack of sufficient witnesses appeared on face of instrument); *Cureton v. Taylor*, 89 Ga. 490, 15 S. E. 643; *Wall v. Wall*, 123 Pa. 545, 16 Atl. 598, 10 Am. St. Rep. 549 (will unsigned when probated).

⁹⁰ *Dublin v. Chadbourn*, 16 Mass. 433; *Opp v. Chess*, 204 Pa. 401, 54 Atl. 354.

In a few jurisdictions, probate of wills devising real estate furnishes only prima facie evidence of validity in a suit concerning the property devised. See *Thomas v. Williamson*, 51 Fla. 332, 40 South. 831.

of a competent testator executed in conformity to law, not what the will itself is nor how it is to be interpreted. Hence probate, until set aside, is conclusive as to testamentary capacity,⁹¹ absence of undue influence⁹² or fraud,⁹³ due execution,⁹⁴ and that the will has not been revoked.⁹⁵ A will properly executed and proved must be admitted to probate, although none of its provisions are valid or capable of execution. The probate does not establish the validity of any of its provisions, nor any question of construction.⁹⁶ So the probate court cannot, in proceedings for the probate of a will, determine whether a party had an interest in the property disposed of by the will,⁹⁷ nor whether a murderer can take under the will of his victim,⁹⁸ nor whether the title to real property passes under the will,⁹⁹ nor does the probate in any way determine the force and effect of the will upon the title to real property claimed under it.¹ So the fact that the testator had made a contract to dispose of his property by will in a certain manner does not affect the right to probate of a will making a different disposition thereof, since the

⁹¹ *In re Oskamp's Will*, 7 Ohio N. P. 665; *Manship v. Stewart*, 181 Ind. 299, 104 N. E. 505; *Reeves v. Hager*, 101 Tenn. 712, 50 S. W. 760; *Vestry of St. John's Parish v. Bostwick*, 8 App. D. C. 452; *In re Merriam*, 136 N. Y. 58, 32 N. E. 621; *Appeal of Hegarty*, 75 Pa. 503; *Jones v. Roberts*, 84 Wis. 465, 54 N. W. 917.

⁹² *Id.*

⁹³ *Hoscheld's Estate*, 78 Wash. 309, 139 Pac. 61.

⁹⁴ *Burkett v. Whittemore*, 36 S. C. 428, 15 S. E. 616; *Rumph v. Hlott*, 35 S. C. 444, 15 S. E. 235; *Loring v. Society*, 171 Mass. 401, 402, 50 N. E. 936; *Brigham v. Fayerweather*, 140 Mass. 411, 5 N. E. 265; *Holman v. Perry*, 4 Metc. (Mass.) 492, 497; *Reeves v. Hager*, 101 Tenn. 712, 50 S. W. 760; *Ware v. Wisner (C. C.)* 50 Fed. 310; *SUMNER v. CRANE*, 155 Mass. 483, 29 N. E. 1151, 15 L. R. A. 447, *Dunmore Cas. Wills*, 186; *Horton v. Barto* (1910) 57 Wash. 477, 107 Pac. 191, 135 Am. St. Rep. 999. There are sometimes provisions by statute to this effect. See *Jones v. Roberts*, 84 Wis. 465, 54 N. W. 917; *Dicke v. Wagner*, 95 Wis. 260, 70 N. W. 159.

⁹⁵ *Clapp v. Vatcher*, 9 Cal. App. 462, 99 Pac. 549; *Delehanty v. Pitkin*, 76 Conn. 412, 56 Atl. 881; *Sutton v. Hancock*, 118 Ga. 436, 45 S. E. 504; *Bowen v. Allen*, 113 Ill. 53, 55 Am. Rep. 398.

⁹⁶ 1 *Woerner, Law of Administration*, 501; *In re Murphy's Estate*, 104 Cal. 554, 38 Pac. 543; *Appeal of Bent*, 35 Conn. 523; *Clearspring Tp. v. Blough* (1909) 173 Ind. 15, 88 N. E. 511, 89 N. E. 369; *SUMNER v. CRANE*, 155 Mass. 483, 29 N. E. 1151, 15 L. R. A. 447, *Dunmore Cas. Wills*, 186; *Lusk v. Lewis*, 32 Miss. 297; *Cox v. Cox*, 101 Mo. 168, 13 S. W. 1055; *Montrose v. Byrne*, 24 Wash. 288, 64 Pac. 534; *Burkett v. Whittemore*, 36 S. C. 428, 15 S. E. 616.

⁹⁷ *Bliss v. Macomb Probate Judge*, 129 Mich. 127, 88 N. W. 390.

⁹⁸ *Id.*

⁹⁹ *In re Merriam*, 136 N. Y. 58, 32 N. E. 621.

¹ *Ware v. Wisner (C. C.)* 50 Fed. 310; *Trustees v. Denmark*, 141 Ga. 390, 81 S. E. 238.

remedy for breach of contract² or in the nature of specific performance³ remains unimpaired.

It results that when a copy of a will which has been admitted to probate is offered in evidence there is a presumption that the requirements of the statute with regard to execution were complied with, and that the will was properly admitted to probate.⁴

Similar principles apply when a will already probated in one country or state is offered for probate in another jurisdiction. As to all facts necessary to the establishment of the will, and as to the regularity of the proceedings and their conformity to the laws of the country or state where they are had, the judgment of probate is conclusive. The only proper matters of inquiry in the second jurisdiction are whether the record presented is duly authenticated, whether the court in which the will was originally allowed had jurisdiction and whether there is any property on which, in event of a second probate, the will may operate.⁵

The ancillary probate or record of a foreign will, in its effect upon property within the jurisdiction, is conclusive of the facts which entitle a will to ancillary probate.⁶

Probate Binding on Whom

While in some jurisdictions probate is a proceeding in rem and binding on all the world,⁷ in others it binds only parties or persons interested who were duly notified,⁸ while in others it affects parties having actual cognizance of the proceedings, whether made formal parties and duly notified or not.⁹

Judgment of Probate Cannot be Attacked Collaterally

The usual rule with regard to judgments rendered by a court of competent jurisdiction applies to the decrees of a competent court

² SUMNER v. CRANE, 155 Mass. 483, 29 N. E. 1151, 15 L. R. A. 447, Dunmore Cas. Wills, 186; In re Gloucester's Estate (Sur.) 11 N. Y. Supp. 899.

³ Everdell v. Hill, 58 App. Div. 151, 68 N. Y. Supp. 719, reversing 27 Misc. Rep. 285, 58 N. Y. Supp. 447.

⁴ Newman v. Iron Co., 25 C. C. A. 382, 80 Fed. 228; Barbour v. Moore, 4 App. D. C. 535. And the rule applies even when the restoration of a record destroyed by fire only shows one attesting witness. Grand Tower Min., Mfg. & Transp. Co. v. Gill, 111 Ill. 541.

⁵ Crosswell, Ex'rs & Adm'rs, 150. And see Newcomb v. Newcomb, 108 Ky. 582, 57 S. W. 2, 51 L. R. A. 419; Putnam v. Safe-Deposit Co., 66 App. Div. 136, 72 N. Y. Supp. 968.

⁶ Copley v. Ball, 176 Fed. 682, 100 C. C. A. 234.

⁷ Carpenter v. Bailey, 127 Cal. 582, 60 Pac. 162; Davies v. Leete, 111 Ky. 659, 64 S. W. 441; Bonnemort v. Gill, 167 Mass. 338, 45 N. E. 768; First Nat. Bank of Austin v. Sharpe, 12 Tex. Civ. App. 223, 33 S. W. 676.

⁸ Young v. Wark, 76 Miss. 829, 25 South. 660; Medlock v. Merritt, 102 Ga. 212, 29 S. E. 185.

⁹ Young v. Holloway, [1895] Prob. 87, 11 Rep. 596.

admitting a will to probate. Such decrees can be attacked only by a proceeding immediately directed to that end; they cannot be assailed collaterally,¹⁰ as in a suit in ejectment by the heirs against the devisees,¹¹ or a suit by the devisee to quiet title where the defendant undertakes to allege that the devise was procured by fraud.¹² So ancillary probate based on a decree of probate in another state cannot be attacked collaterally.¹³ Neither can the probate be attacked in a collateral proceeding on the ground that one of the witnesses to the will was incompetent,¹⁴ the fact not appearing on the face of the will, nor on the ground that the testator's handwriting was improperly proved.¹⁵

The same principles control in one state with regard to the decree of a sister state admitting a will to probate.¹⁶

But where the probate of a will devising real estate is only presumptive evidence of its validity, it is subject to collateral attack in any action in which it may be offered as evidence.¹⁷ And in all cases where the decree of probate is an absolute nullity, as for want of jurisdiction, it may be impeached collaterally.¹⁸ The probate of the will of a married woman, under disability to make a will, does not render it valid.¹⁹ It is well settled that the appointment of an administrator of the estate of a person who is still alive is void, and may be assailed collaterally,²⁰ and the same rule should apply to the probate of the will of a living testator.

¹⁰ *Carraway v. Moore*, 75 Ark. 146, 86 S. W. 993; *Churchill v. Jackson*, 132 Ga. 666, 64 S. E. 691, 49 L. R. A. (N. S.) 875, Ann. Cas. 1913E, 1203; *Leslie v. Maxey* (Ky.) 67 S. W. 839; *Kentucky Land & Immigration Co. v. Crabtree*, 113 Ky. 922, 70 S. W. 31; *Holland v. Holland*, 121 Mich. 109, 79 N. W. 1102; *James White Memorial Home v. Price*, 195 Ill. 279, 62 N. E. 872.

¹¹ *Ward v. Board*, 12 Okl. 267, 70 Pac. 378.

¹² *Winslow v. Donnelly*, 119 Ind. 565, 22 N. E. 12.

¹³ *St. Joseph's Convent v. Garner*, 66 Ark. 623, 53 S. W. 298; *Dickey v. Vann*, 81 Ala. 425, 8 South. 195; *Stanley v. Morse*, 26 Iowa, 454; *Calloway v. Cooley*, 50 Kan. 743, 32 Pac. 372; *Ward v. Hearne*, 44 N. C. 184; *In re Mackin's Estate*, 14 Phila. (Pa.) 328; *Lovett's Ex'rs v. Mathews*, 24 Pa. 330; *Acklin v. Paschal*, 48 Tex. 147; *Townsend v. Downer's Estate*, 32 Vt. 183.

¹⁴ *Chicago Title & Trust Co. v. Brown*, 183 Ill. 42, 55 N. E. 632, 47 L. R. A. 798.

¹⁵ *McClure v. Spivey*, 123 N. C. 678, 31 S. E. 857.

¹⁶ *Garvey v. Guaranty Co.*, 77 App. Div. 391, 79 N. Y. Supp. 337.

¹⁷ *Barbour v. Moore*, 4 App. D. C. 535; *Corley v. McElmeel*, 149 N. Y. 228, 43 N. E. 628.

¹⁸ *Holyoke v. Holyoke's Estate*, 110 Me. 409, 87 Atl. 40; *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114.

¹⁹ *Gregory v. Oates*, 92 Ky. 532, 18 S. W. 231.

²⁰ *Carr v. Brown*, 20 R. I. 215, 38 Atl. 9, 38 L. R. A. 294, 78 Am. St. Rep. 855; *Scott v. McNeal*, 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. Ed. 896; *Jochumsen v. Bank*, 8 Allen (Mass.) 87; *Morgan v. Dodge*, 44 N. H. 255, 82 Am. Dec. 213.

Costs and Attorney's Fees

The matter of costs is, to a considerable extent, regulated by statute. The rule in equitable cases that costs may be adjudged by the court according to the right and equity of the cause applies where the will is contested by a bill in chancery.²¹ The question rests largely in the discretion of the court, and this is occasionally provided, in terms, by statute.²² In the exercise of this discretion, if the defeated contestant has carried on the contest in good faith, and the questions involved, whether of fact or law, are worthy of serious consideration, his costs are generally allowed out of the estate.²³ But no costs will be allowed an unsuccessful contestant in the absence of good faith on his part,²⁴ or of reasonable ground of opposition.²⁵ But sometimes the existence of this discretion is denied, and the unsuccessful contestant is required to pay the costs, as in other cases.²⁶ Statutes sometimes determine when the estate shall be thus charged with costs.²⁷ When a court, either by statute or

²¹ *Shaw v. Camp*, 56 Ill. App. 23.

²² *In re McKinney's Estate*, 112 Cal. 447, 44 Pac. 743; *Cheever v. North*, 106 Mich. 390, 64 N. W. 455, 37 L. R. A. 561, 58 Am. St. Rep. 499; *In re Mondorf's Will*, 110 N. Y. 450, 18 N. E. 256.

²³ *Seebrook v. Fedawa*, 33 Neb. 413, 50 N. W. 270, 29 Am. St. Rep. 488; *Frost v. Wheeler*, 43 N. J. Eq. 573, 12 Atl. 612; *In re Drake's Will*, 45 App. Div. 206, 60 N. Y. Supp. 1020; *In re Keeler*, 7 N. Y. Supp. 199, 23 Abb. N. C. 376; *Read v. Franklin* (Tenn. Ch. App.) 60 S. W. 215; *Jones v. Roberts*, 96 Wis. 427, 70 N. W. 685, 71 N. W. 883; *In re Healy's Will*, 108 Wis. 632, 84 N. W. 835; *Roberts v. Roberts*, 107 Wis. 213, 83 N. W. 318.

²⁴ *BUMP'S ESTATE* (1907) 152 Cal. 271, 92 Pac. 642, *Dunmore Cas. Wills*, 184; *In re Kivlin's Will*, 37 Misc. Rep. 187, 74 N. Y. Supp. 937; *In re Tacke's Will* (Sur.) 3 N. Y. Supp. 198.

²⁵ *In re Castle's Estate*, 15 Civ. Proc. R. 276, 2 N. Y. Supp. 638; *In re Whelan*, 6 Dem. Sur. 425, 2 N. Y. Supp. 635. And no reasonable cause is regarded as existing where probate is resisted upon an immaterial issue, under a misapprehension of the law, which is not disabused by the court, and is shared in by the proponent. *Burr v. Burr*, 53 N. J. Eq. 627, 33 Atl. 796.

²⁶ *Allen v. Seaward*, 86 Iowa, 718, 52 N. W. 557 (under a general statute providing that costs shall be recovered by the successful against the losing party); *Lawrie v. Lawrie*, 39 Kan. 480, 18 Pac. 499; *Crawford's Heirs v. Thomas*, 114 Ky. 484, 54 S. W. 197, 55 S. W. 12; *Carter's Adm'r v. Carter* (Ky.) 12 S. W. 385. And see *Burr v. Burr*, 53 N. J. Eq. 627, 33 Atl. 796; *Moyer v. Swygart*, 125 Ill. 262, 17 N. E. 450; *Wallace v. Sheldon*, 56 Neb. 55, 76 N. W. 418.

²⁷ New Jersey: P. L. 1898, p. 789, § 197, when the only evidence offered by the contestant is that of the subscribing witnesses, or there were reasonable grounds for such contest. Construed in *Higgins v. McQuirk*, 61 N. J. Eq. 613, 47 Atl. 276.

New York: Code Civ. Proc. § 2558, providing that costs shall not be allowed to the unsuccessful contestant on a contested application for probate, unless he is a special guardian, or the executor named in the paper proposed by him in good faith. Construed in *COLLYER v. COLLYER*, 110 N. Y. 481, 18 N. E. 110, 6 Am. St. Rep. 405, *Dunmore Cas. Wills*, 158.

otherwise, has not authority to allow costs out of the estate, no stipulation of the parties to that effect will enable it to do so.²⁸

Since it is the duty of the executor named in a will to propound the instrument for probate, his costs are payable out of the estate, though probate is denied,²⁹ and this though the executor was the only person to be benefited by establishing the will.³⁰ Only the taxable costs can be awarded, however, and not the amount of the actual expense incurred by the executor.³¹ And it has been held that, where a probated will has been pronounced invalid, the costs are properly taxed against a legatee who was the only person seeking to maintain it.³² A party made defendant in a suit for the construction of a will and appealing from a judgment against her, which is confirmed, is entitled to costs.³³ And where legacies to charitable institutions are successfully assailed by collateral relatives of the testator, the costs of all parties, except those institutions whose legacies were invalid, were held payable out of that part of the estate recovered by the relatives.³⁴

The question as to the giving of security for costs is wholly statutory. While the right to resist original proceedings without giving bond is generally recognized,³⁵ security is frequently required in contest proceedings subsequent thereto,³⁶ especially from parties who are nonresidents,³⁷ though not always.³⁸

Counsel fees incurred by an executor in connection with the establishment of the will are usually payable out of the estate.³⁹ Such

²⁸ *In re Keeler*, 7 N. Y. Supp. 199, 23 Abb. N. C. 376; *In re Derse's Will*, 103 Wis. 108, 79 N. W. 46.

²⁹ *In re Olmstead's Estate*, 120 Cal. 447, 52 Pac. 804; *Tuohy v. Hanlon*, 18 App. D. C. 225; *Perkins v. Perkins*, 116 Iowa, 253, 90 N. W. 55; *In re Carman's Will* (Iowa) 48 N. W. 985; *Delmar v. Delmar*, 65 App. Div. 582, 72 N. Y. Supp. 959; *Lassiter v. Travis*, 98 Tenn. 330, 39 S. W. 226.

Costs will not be allowed to a proponent named as executor, however, when it is adjudged that he procured the execution of the will by fraud and undue influence. *Deleglise's Will*, 142 Wis. 234, 125 N. W. 452.

³⁰ *Lassiter v. Travis*, *supra*.

³¹ *Brilliant v. Simpson*, 110 Mich. 68, 67 N. W. 1101.

³² *Egbers v. Egbers*, 177 Ill. 82, 52 N. E. 285.

³³ *Miller v. Von Schwarzenstein*, 51 App. Div. 18, 64 N. Y. Supp. 475.

³⁴ *Booth v. Baptist Church*, 126 N. Y. 215, 28 N. E. 238.

³⁵ *Harrison v. Stanton*, 146 Ind. 366, 45 N. E. 582.

³⁶ *Burns v. Travis*, 117 Ind. 44, 18 N. E. 45; *Lange v. Dammler*, 119 Ind. 567, 21 N. E. 749.

³⁷ *Tuthill v. Forbes*, 160 App. Div. 510, 145 N. Y. Supp. 660.

³⁸ *Cash v. Lust*, 142 Mo. 630, 44 S. W. 724, 64 Am. St. Rep. 576.

³⁹ *Henderson v. Simmons*, 33 Ala. 291, 70 Am. Dec. 590; *Tuohy v. Hanlon*, 18 App. D. C. 225; *Sims v. Birdsong's Adm'r* (Ky.) 50 S. W. 993; *Miller v. Gehr*, 91 Md. 709, 47 Atl. 1032; *Hazard v. Eugs*, 14 R. I. 5; *In re Gorkow's Estate*, 20 Wash. 563, 56 Pac. 385.

In some jurisdictions, it is not considered as the duty of the one named

fees are not, however, considered as "costs" in the statutory meaning of that term.⁴⁰ And sometimes no allowance of attorney's fees to either party to a will contest, in addition to statutory costs, is held permissible.⁴¹ Where the more usual doctrine prevails, fees paid to attorneys who acted in good faith, in the effort to establish a will, by an executor who knew that the will was void, and which was ultimately declared to be so, cannot be recovered by the estate.⁴² The amount of counsel fees allowable in behalf of the executor out of the estate is discretionary with the court.⁴³ Counsel fees are not usually allowed to the unsuccessful contestant out of the estate,⁴⁴ nor to a contestant, though successful,⁴⁵ nor to such contestant, where, by compromise agreement, a verdict sustaining the will was taken by consent.⁴⁶ Counsel appointed to represent absent heirs in a will contest may sometimes, by statute, be paid a reasonable fee, to be fixed by the court,⁴⁷ and such fee may be allowed to a guardian ad litem for minor heirs.⁴⁸ So where a will is so ambiguous as to justify a suit for its construction, an attorney's fee, payable from the estate, may be allowed an unsuccessful contes-

executor to defend the will after probate, and, if he does defend, he must look to the devisees and legatees for his expenses. See *Brown v. Vinyard*, Bailey Eq. (S. C.) 460, 462; *Shaw v. Moderwell*, 104 Ill. 64, 70; *Yerkes' Appeal*, 99 Pa. 401; *Andrews v. Andrews*, 7 Ohio St. 148. Where one named executor unsuccessfully defends a contested will, it is difficult to see why the heirs at law should have the burden of paying the expenses incurred in an attempt to deprive them of their property.

⁴⁰ *In re Olmstead's Estate*, 120 Cal. 447, 52 Pac. 804.

⁴¹ *Fox v. Martin*, 108 Wis. 99, 84 N. W. 23, reversing 104 Wis. 581, 80 N. W. 921. In this case the executor had not qualified as such, or received his appointment from the court. In Wisconsin, under Laws 1901, p. 569, c. 397, the court may now, in its discretion, allow to the proponent a reasonable attorney's fee, to be paid out of decedent's estate. *Muellenschlader's Estate*, 137 Wis. 32, 118 N. W. 209.

⁴² *Shaffer v. Bacon*, 35 App. Div. 248, 54 N. Y. S. 796, affirmed in 161 N. Y. 635, 57 N. E. 1124.

⁴³ *Turner's Guardian v. King*, 98 Ky. 253, 32 S. W. 941, 33 S. W. 405; *Miller v. Gehr*, 91 Md. 709, 47 Atl. 1032; *Campbell v. McGuilgan* (N. J. Prerog.) 34 Atl. 383.

⁴⁴ *West v. Place*, 4 Misc. Rep. 19, 23 N. Y. Supp. 1089; *CLARK v. TURNER*, 50 Neb. 290, 69 N. W. 843, 38 L. R. A. 433, *Dunmore Cas. Wills*, 188; *McClary v. Stull*, 44 Neb. 175, 62 N. W. 501.

Statutes are sometimes construed as authorizing the allowance of counsel fees to any party when the contest is not without merit. *Bloren v. Nesler* (1909) 76 N. J. Eq. 576, 74 Atl. 791; *Hilyard v. Wood*, 71 N. J. Eq. 214, 63 Atl. 7.

⁴⁵ *Taylor v. Minor*, 90 Ky. 544, 14 S. W. 544. See, also, *Quinn's Estate*, 179 Mich. 61, 146 N. W. 297.

⁴⁶ *In re Titlow's Estate*, 163 Pa. 35, 29 Atl. 758.

⁴⁷ *In re Roarke's Estate*, 8 Ariz. 16, 68 Pac. 527.

⁴⁸ *Wilbur v. Wilbur*, 138 Ill. 446, 27 N. E. 701.

tant.⁴⁹ No counsel fees from the estate can be allowed to creditors of the legatees who employ attorneys to defend the will,⁵⁰ nor to beneficiaries, when the executor has himself employed counsel to defend the will,⁵¹ though they may be chargeable against the portion of the estate devised to such beneficiaries.⁵²

PROBATE AS AFFECTED BY AGREEMENTS NOT TO CONTEST

98. Agreements upon consideration between parties interested in and opposed to the probate of a will, that the latter will not contest its probate, if made with full knowledge of all the circumstances, are valid.

If made under ordinary circumstances, there seems no objection to the rule as above stated. While it may result in giving effect to the will of an incompetent testator, or of one produced by fraud or undue influence, yet if the parties financially interested are willing, under proper inducement, to accept a disposition thus originating, it amounts substantially to a determination by them of their property rights, to which no considerations of public policy stand opposed. Indeed, "the settlement of controversies by reason of which the harmony of families is destroyed is favored by the law."⁵³ But an agreement to settle pending litigation cannot be urged as a bar to a proceeding for the probate of a will, in the absence of statutory power on the part of the probate court to enforce specific performance of contracts, resort being had in such cases to courts of equity,⁵⁴ though there is authority the other way.⁵⁵ But a contract made by an heir, with him from whom he might inherit, not to contest the latter's will will estop him from making such a contest.⁵⁶

⁴⁹ *Ingraham v. Ingraham*, 169 Ill. 432, 48 N. E. 561, 49 N. E. 320.

⁵⁰ *Hamilton v. Shillington*, 19 App. D. C. 268.

⁵¹ *West v. Place*, 4 Misc. Rep. 19, 23 N. Y. Supp. 1089; *Atkinson v. May's Estate*, 57 Neb. 137, 77 N. W. 343.

⁵² *Hinckley v. Stebbins*, 3 Cal. Unrep. Cas. 478, 29 Pac. 52; *McIntire v. McIntire*, 14 App. D. C. 337; *Smith's Estate*, 165 Iowa, 614, 146 N. W. 836.

⁵³ 1 Underhill, Wills, § 294.

⁵⁴ *Shurte v. Fletcher*, 111 Mich. 84, 69 N. W. 233. See *Finch v. Finch*, 14 Ga. 362.

In the absence of fraud, a court of equity will enforce a contract made by an heir, in which he accepts a specific amount in full of all his expectancy, even though it turns out to have been a disadvantageous bargain to him. *Eissler v. Hoppel*, 158 Ind. 82, 62 N. E. 692.

⁵⁵ *Stringfellow v. Early*, 15 Tex. Civ. App. 597, 40 S. W. 871.

⁵⁶ *In re Garcelon's Estate*, 104 Cal. 590, 38 Pac. 414, 32 L. R. A. 595, 43 Am. St. Rep. 134; *Gore v. Howard*, 94 Tenn. 577, 30 S. W. 730.

An agreement to distribute the estate as the estate of an intestate,⁵⁷ or without reference to the terms of the will which has been probated,⁵⁸ or in accordance with the terms of the will without probate,⁵⁹ is valid. An infant, under the approval of a court of equity, may become a party to a family compromise, though he cannot be compelled to do so.⁶⁰

A contract between heirs not to contest a will may be set up by the executor, although he is not a party thereto, in defending a contest by a part of such heirs.⁶¹

PROBATE OF LOST OR DESTROYED WILLS

99. In the absence of statutory limitation, a will lost, or mutilated without intent thereby to revoke, may be admitted to probate upon satisfactory proof of its contents and due execution.

As has been already indicated,⁶² a will not found at the death of the testator is presumed to have been destroyed by him with intent to revoke. But this presumption may be overcome, and if the testator dies, having once executed a will which he has not revoked in one of the methods heretofore indicated, it is his will, and if the document cannot be produced, its contents and execution may be proved in much the same manner as those of any other instrument, except that, in view of the peculiar opportunities for fraud and temptation thereto, the proof of these facts must be clear and convincing.⁶³ But, while the evidence must be full and satisfactory, it need

⁵⁷ *Stringfellow v. Early*, 15 Tex. Civ. App. 597, 40 S. W. 871.

⁵⁸ *Louisville & N. R. Co. v. Sander's Adm'r* (Ky.) 44 S. W. 644; *Cuthbert v. Chauvet*, 20 N. Y. Supp. 336, 65 Hun, 624; *Bracken's Estate*, 138 Pa. 104, 22 Atl. 20.

⁵⁹ *Knight v. Knight*, 113 Ala. 597, 21 South. 407.

⁶⁰ *In re Birchall*, L. R. 16 Ch. D. 41.

⁶¹ *Reichard v. Izer*, 95 Md. 451, 52 Atl. 592.

⁶² Ante, p. 259.

⁶³ *Coddington v. Jenner*, 60 N. J. Eq. 447, 45 Atl. 1090, affirming 57 N. J. Eq. 528, 41 Atl. 874; *Scoggins v. Turner*, 98 N. C. 135, 3 S. E. 719.

So when a paper, offered as a copy of a destroyed will, is read over to a witness at the trial, who testified, "That is right, as near as I can recollect," the proof is insufficient (*McCarn v. Rundall*, 111 Iowa, 406, 82 N. W. 924), as is also the case where the only evidence was that of a witness 85 years old, who testified that, 68 years before, she had seen the will and heard it read, and who undertook to testify minutely as to its provisions (*Apperson v. Dowdy*, 82 Va. 776, 1 S. E. 105). So, also, where one of the attesting witnesses swore that the will gave all the decedent's estate to his mother, and the other,

not be such as to remove all reasonable doubts as to the contents.⁶⁴ And it is enough to prove the substance of the will, without proving the precise language or terms employed.⁶⁵ But it seems that probate of such a will cannot be had on a stipulation of counsel as to its contents.⁶⁶

It is sometimes provided by statute that a lost or destroyed will cannot be established unless it was in existence at the time of the testator's death, or was fraudulently destroyed in his lifetime.⁶⁷ Consequently probate is denied when a will is destroyed accidentally by its custodian, during the life of the testator.⁶⁸ Under such a statute, fraudulent destruction not being relied upon, the petition to establish a lost will must aver its existence at the testator's death.⁶⁹

that the devise was to her heirs, and there was no evidence that there were not other legacies. *In re Purdy's Will*, 46 App. Div. 33, 61 N. Y. Supp. 430.

For further cases illustrating insufficient proof, see *Kahn v. Hoes*, 14 Misc. Rep. 63, 35 N. Y. Supp. 273; *Keesy v. Dimon*, 37 N. Y. Supp. 92, 91 Hun, 642.

Proof was held sufficient when a pencil copy, drafted by testatrix's attorney, was offered, with testimony that the will, before execution, was compared with the pencil copy, and found to agree therewith (*Coddington v. Jenner*, 60 N. J. Eq. 447, 45 Atl. 1090), as was also the case when a witness testified to the execution and contents of the will, and the records of a county court showed how the lands in controversy were devised by the will (*McNeely v. Pearson* [Tenn. Ch. App.] 42 S. W. 165). See, also, *In re De Groot*, 2 Con. Sur. 210, 9 N. Y. Supp. 471. But where a will is lost after probate, no greater degree of proof is required of its contents than upon any other issue of fact. *Rumph v. Hiott*, 35 S. C. 444, 15 S. E. 235.

⁶⁴ *Skeggs v. Horton*, 82 Ala. 352, 2 South. 110.

⁶⁵ *Jones v. Casler*, 139 Ind. 382, 38 N. E. 812, 47 Am. St. Rep. 274.

⁶⁶ *In re Ruser*, 6 Dem. Sur. (N. Y.) 31.

⁶⁷ Code Civ. Proc. N. Y. § 1865. Actual fraud must be shown in such cases. *In re De Groot*, 2 Con. Sur. 210, 9 N. Y. Supp. 471.

Declarations of the testator, shortly before his death, showing a belief on his part that his will was in existence, are admissible, as bearing on the question of its existence at the time of his death. *In re Cosgrove's Will*, 31 Misc. Rep. 422, 65 N. Y. Supp. 570. See *In re Kennedy's Will*, 53 App. Div. 105, 65 N. Y. Supp. 879. But the mere fact that the will was in existence six or eight weeks prior to testator's death is not sufficient to overcome the presumption of revocation. *In re Kennedy's Will*, supra. For similar statute, see Code Civ. Proc. Cal. § 1339, construed in *In re Johnson's Estate*, 134 Cal. 662, 66 Pac. 847.

In Ohio, under Gen. Code 1910, § 10543, no will can be probated unless it is proved to have been in existence after the death of the testator or after he became insane, and a will of a competent testator is not entitled to probate, if destroyed prior to his death, even though destruction was without his knowledge or against his will. *Gibson v. Gibson*, 25 Ohio Cir. Ct. R. 698.

⁶⁸ *In re Reiffeld's Will*, 36 Misc. Rep. 472, 73 N. Y. Supp. 808.

⁶⁹ *Harris v. Harris*, 10 Wash. 555, 39 Pac. 148. An averment that said deceased left a will is enough (*Id.*), or that the will was destroyed after his death (*Jones v. Casler*, 139 Ind. 382, 38 N. E. 812, 47 Am. St. Rep. 274).

The jurisdiction to establish lost wills is usually determined by statute, and it is commonly confided to the courts having ordinary probate jurisdiction, sometimes to courts of equity. In the absence of a statute, probate courts have this power, if they have general equity powers, or can frame an issue *devisavit vel non*, and call a jury to try that issue; otherwise, resort must be had to equity.⁷⁰

Testator's Knowledge of Destruction

Whether a will can be proved if the testator was aware of its destruction seems doubtful.⁷¹ Strictly, however, it would appear that if the will were not destroyed at his request and under his direction his mere knowledge of the fact and acquiescence therein should not affect the question. Such knowledge and acquiescence are, of course, no revocation. A will, unrevoked, is the testator's will, and should be given effect as such. To hold otherwise is practically to enable a testator to effect a revocation in some other than the statutory methods.

Procedure

Proceedings for the probate of a lost will are generally begun by a petition to the proper court, setting forth the substance of the will or a copy thereof, its due execution, and loss or destruction.⁷² The petition may be brought by any party interested in the establishment thereof.⁷³ Notice of the pendency of such petition is generally required, and, broadly, the procedure, is substantially the same as in that for the probate of a will under ordinary circumstances.⁷⁴

Evidence

The party undertaking to establish a lost will must prove its due execution, as much as though the instrument itself were propounded for that purpose.⁷⁵ This proof must be effected by the attesting witnesses, if they are available, the number required to be produc-

⁷⁰ See Thornton, *Lost Wills*, § 16. Originally, in England, a lost will of personalty could be set up in the ecclesiastical courts, and possibly in the court of chancery. A lost will of realty, however, could only be established in the latter court. *Buchanan v. Matlock*, 8 Humph. (Tenn.) 390, 47 Am. Dec. 622; *Dower v. Seeds*, 28 W. Va. 113, 57 Am. Rep. 646.

⁷¹ *Dawson v. Smith*, 3 Houst. (Del.) 335, holds that it cannot. See, also, *Parsons v. Balson*, 129 Wis. 311, 109 N. W. 136. Contra: *Youndt v. Youndt*, 3 Grant, Cas. (Pa.) 140.

⁷² The petition need not allege the time, place, or manner of destruction, or by whom will was destroyed. *Gfroerer v. Gfroerer* (1910) 173 Ind. 424, 90 N. E. 757.

⁷³ *Donlon v. Kimball*, 61 App. Div. 31, 70 N. Y. Supp. 252. As to what constitutes a party "interested" in the probate of a will, see ante, 281.

⁷⁴ See ante, p. 287.

⁷⁵ *In re Page*, 118 Ill. 579, 8 N. E. 852, 59 Am. Rep. 395; *Collyer v. Collyer*, 4 Dem. Sur. (N. Y.) 53, 17 Abb. N. O. (N. Y.) 328; *In re Lasance's Estate*, 5 Ohio N. P. 20.

ed being determined by the local practice in regard to the probate of wills in general.⁷⁶ If the witnesses are dead, execution may be proved by secondary evidence, as by proof of the handwriting of the witnesses by one who saw and recognized it,⁷⁷ or by showing the fact of attestation by the requisite number of persons.⁷⁸

After satisfactory proof that the will has been lost, or destroyed, without intent to revoke, the proponent has the burden of establishing the contents of the will,⁷⁹ by secondary evidence. No particular number of witnesses is required for this purpose, one being enough,⁸⁰ though two are sometimes required by statute.⁸¹ Proof may be made by copy, or from the recollection of persons acquainted with its contents. Whether, in event of a copy's being shown to exist, the proponent must account for its absence before proceeding to offer oral evidence of the contents of the will would depend upon whether or no degrees of secondary evidence are recognized in the jurisdiction.⁸² A draft of a will may be used as evidence of its contents,⁸³ and also memoranda of the contents made by the testator.⁸⁴

The proponent of a lost will must show that it was not destroyed by the testator with intent to revoke,⁸⁵ and, if he alleges the inca-

⁷⁶ See ante, p. 218; *Scott v. Maddox*, 113 Ga. 795, 39 S. E. 500, 84 Am. St. Rep. 263.

⁷⁷ *Tynan v. Paschal*, 27 Tex. 786, 84 Am. Dec. 619; *Thornton, Lost Wills*, § 44.

⁷⁸ *Jackson v. Betts*, 6 Cow. (N. Y.) 377.

⁷⁹ *Newell v. Homer*, 120 Mass. 277; *Davis v. Sigourney*, 8 Metc. (Mass.) 487. The same kind of evidence may be used as is competent to prove the contents of other lost instruments. *McNeely v. Pearson* (Tenn. Ch. App.) 42 S. W. 165.

⁸⁰ *Skeggs v. Horton*, 82 Ala. 352, 2 South. 110; *Varnon v. Varnon*, 67 Mo. App. 534; *Hedgepeth's Will*, 150 N. C. 245, 63 S. E. 1025.

⁸¹ New York: Code Civ. Proc. § 1865, construed in *In re Purdy's Will*, 25 Misc. Rep. 458, 55 N. Y. Supp. 644; *In re Waldron's Will*, 19 Misc. Rep. 333, 44 N. Y. Supp. 353; *In re Granacher's Will*, 74 App. Div. 567, 77 N. Y. Supp. 748.

California: Code Civ. Proc. § 1339, construed in *In re Camp's Estate*, 134 Cal. 233, 68 Pac. 227, holding that probate may be had, though the witnesses may differ as to the exact language of the will.

Indiana: *Burns' Rev. St.* 1914, § 3167, construed in *Jones v. Casler*, 139 Ind. 382, 38 N. E. 812, 47 Am. St. Rep. 274.

Washington: Code Proc. § 879, construed in *Harris v. Harris*, 10 Wash. 555, 39 Pac. 148.

See, also, *In re Buechle's Estate*, 17 Pa. Co. Ct. R. 449.

⁸² See 1 Greenl. Ev. (16th Ed.) §§ 582, 563q.

⁸³ *Wyckoff v. Wyckoff*, 16 N. J. Eq. 401; *Colvin v. Fraser*, 2 Hagg. 266.

⁸⁴ *Foster's Will*, 13 Phila. (Pa.) 567; *Sugden v. Lord St. Leonards*, L. R. 1 P. D. 154.

⁸⁵ *McIntosh v. Moore*, 22 Tex. Civ. App. 22, 53 S. W. 611. See *Perry v. Perry*, 66 Hun, 629, 21 N. Y. Supp. 133.

capacity of the testator to revoke a will destroyed by him, he must prove such incapacity.⁸⁶

Where there is evidence that the sole devisee under one will fraudulently suppressed a later will which it is sought to prove, the declarations of such devisee are admissible to show the existence and contents of the later will, as against persons claiming under him.⁸⁷

Declarations of the Testator as Evidence

Where there is other evidence with regard to the contents of a lost will, it is settled by the decided weight of authority that declarations of the testator, made before or after the execution of the will, may be received in corroborative proof of its contents.⁸⁸ Apparently the contents of the will cannot be shown solely by such declarations.⁸⁹

The same principles apply to the proof of a portion of a will which has been destroyed as prevail in case of the destruction of the entire document.⁹⁰

Proof of Part of Lost Will

While it seems to be agreed that a revocatory clause in a subsequent will which has been destroyed may be proved to show the revocation of a prior will,⁹¹ yet there is some authority for the view that, to give effect to a lost will as a testamentary instrument, its entire contents must be proved.⁹² But the better view, on principle, and the one sustained by the weight of authority, is that, where the

⁸⁶ *Id.* See, also, *Shacklett v. Roller*, 97 Va. 639, 34 S. E. 492.

⁸⁷ *In re Lamble's Estate*, 97 Mich. 49, 56 N. W. 223.

⁸⁸ *Sugden v. Lord St. Leonards*, L. R. 1 P. D. 154 (overruling *Quick v. Quick*, 3 Sw. & Tr. 442); *Schnee v. Schnee*, 61 Kan. 643, 60 Pac. 738; *Muller v. Muller*, 108 Ky. 511, 56 S. W. 802; *In re Lamble's Estate*, 97 Mich. 49, 56 N. W. 223; *Mann v. Balfour*, 187 Mo. 290, 86 S. W. 103; *Lane v. Hill*, 68 N. H. 275, 44 Atl. 393, 73 Am. St. Rep. 591; *CLARK v. TURNER*, 50 Neb. 290, 69 N. W. 843, 38 L. R. A. 433, *Dunmore Cas. Wills*, 188; *Wigmore on Ev.* § 1736, and cases there cited.

⁸⁹ *Griffith v. Higinbottom*, 262 Ill. 126, 104 N. E. 233, *Ann. Cas.* 1915B, 250; *CLARK v. TURNER*, 50 Neb. 290, 69 N. W. 843, 38 L. R. A. 433, *Dunmore Cas. Wills*, 188; *Woodward v. Goulstone*, 11 App. Cas. 469.

⁹⁰ *Varnon v. Varnon*, 67 Mo. App. 534.

⁹¹ *Ante*, p. 237.

⁹² *Todd v. Rennick*, 13 Colo. 546, 22 Pac. 898; *In re Ruser*, 6 Dem. Sur. (N. Y.) 31; *Wallis v. Wallis*, 114 Mass. 510; *Newell v. Homer*, 120 Mass. 277.

It is held, however, that, where it is sought to establish a lost will by copy, the fact that the will contained a clause not appearing in the copy, appointing decedent's husband as her executor, will not prevent the establishment of the will according to the copy, the husband having died before the testatrix. *Tarbell v. Forbes*, 177 Mass. 238, 58 N. E. 873.

contents are not completely proved, probate will be granted to the extent to which they are proved.⁹³

Miscellaneous

When a will has once been probated, and is subsequently destroyed, formal evidence of its execution need not be given before proof of its contents is admissible; ⁹⁴ nor, when the record of probate has been destroyed by fire, does the refusal of the probate court to restore the record preclude the claimants under a will from showing its probate.⁹⁵ And while due effort must be made to find a lost will, yet such effort need not precede the beginning of the suit to establish it.⁹⁶

PROBATE OR RECORD OF FOREIGN WILLS

100. A foreign will, in the sense that the term is commonly used, is one which has been probated in the testator's domicile, under which rights are claimed in another jurisdiction. Such wills must ordinarily be probated or recorded in the second jurisdiction to enable any suit to be brought therein in respect of the personal rights or property of the testator, or to render the will operative upon realty there situated. Statutes for this purpose have been generally enacted.

In view of the doctrine that real property, so far as its title and disposition are concerned, is controlled by the law of the place of its location, coupled with the extraterritorial invalidity of local law, it follows that a will made in a foreign state or country, and proved there, disposing of property elsewhere, must also be proved in the jurisdiction where the property is situated, if its provisions are to be enforced, in the absence of legislation giving validity to foreign probate.⁹⁷

The clause of the federal Constitution requiring full faith and credit to be given in each state to the records and judicial proceedings of every other state does not render the probate of a will in one state conclusive as to the validity of its provisions respecting

⁹³ *Skeggs v. Horton*, 82 Ala. 352, 2 South. 110; *Patterson's Estate*, 155 Cal. 626, 102 Pac. 941, 26 L. R. A. (N. S.) 654, 132 Am. St. Rep. 116, 18 Ann. Cas. 625; *Jones v. Casler*, 139 Ind. 382, 38 N. E. 812, 47 Am. St. Rep. 274; *Dickey v. Malechi*, 6 Mo. 177, 34 Am. Dec. 130; *Cahill v. Owens*, 3 Ohio Dec. (Reprint) 8.

⁹⁴ *Marshall v. Marshall*, 42 S. C. 436, 20 S. E. 298.

⁹⁵ *McClaskey v. Barr* (C. C.) 47 Fed. 154.

⁹⁶ *Jones v. Casler*, 139 Ind. 382, 38 N. E. 812, 47 Am. St. Rep. 274.

⁹⁷ *Solis v. Williams*, 205 Mass. 350, 91 N. E. 148; 1 *Woerner, Am. Law of Administration*, 491.

realty in another state,⁹⁸ for the courts of the former state have no jurisdiction to adjudicate regarding the methods of passing title to land in another state, neither does the national Constitution undertake to give any extraterritorial effect to the laws of the states. Local legislation providing for the re-probate or effectuating of foreign wills is universal, though it varies considerably in its details. It is extensively provided that the will of a nonresident, probated in the state of his domicile, may be admitted to probate upon the production of a duly authenticated copy, together with the record of the probate, without other proof or notice.⁹⁹ In other jurisdictions notice must be given to persons interested.¹ Under these

⁹⁸ *Keith v. Johnson*, 97 Mo. 223, 10 S. W. 597; *Nelson v. Potter*, 50 N. J. Law, 324, 15 Atl. 375 (construing Const. U. S. art. 4, § 1).

⁹⁹ 1 Woerner, *Am. Law of Administration*, 492. Such is the case in—

Arkansas: Dig. St. 1904, § 8033.

Colorado: Mills' Ann. St. 1912, § 7892.

Delaware: Rev. Code 1893, c. 84, § 6.

Florida: Rev. St. 1914, § 2287.

Georgia: Code 1910, § 3875.

Illinois: Jones & A. Ann. St. 1913, § 11550.

Indiana: Burns' Rev. St. 1914, §§ 3149-3153.

Iowa: *Vance v. Anderson*, 39 Iowa, 426; Code 1897, § 3294.

Michigan: How. Ann. St. 2d Ed. 1913, § 10995.

Mississippi: Rev. Code 1906, § 2004.

Missouri: Rev. St. 1889, §§ 8900, 8901.

New Jersey: St. 1911, p. 3820, § 23.

New York: Code Civ. Proc. 1887, §§ 2703-2705.

North Carolina: Code 1908, § 3133.

Oregon: Hill's Ann. Laws 1887, § 3083.

Pennsylvania: Pepp. & L. Dig. 1894, p. 1454, § 58.

South Carolina: Code 1912, § 3583.

Tennessee: Code 1896, § 3916.

Texas: Vernon's Sayles' Ann. Civ. St. 1914, art. 3276.

Virginia: Code 1904, § 2536.

Washington: Code 1896, §§ 5360, 5361.

West Virginia: Code 1913, § 3890.

Wisconsin: Sanb. & B. Ann. St. 1889, § 2295.

¹ Arizona: Rev. St. 1913, par. 756.

California: Code Civ. Proc. § 1323.

Connecticut: Gen. St. 1902, § 305.

Idaho: Rev. Code 1908, § 5316.

Maine: Rev. St. 1903, p. 598, § 13.

Massachusetts: Rev. Laws 1902, c. 136, § 10.

Minnesota: Gen. St. 1913, § 7275.

Montana: Rev. Code 1907, § 7405.

Nebraska: Rev. Stat. 1913, § 1308.

Ohio: Gen. Code 1910, § 10538.

Oklahoma: Rev. Laws 1910, § 6217.

Rhode Island: Gen. Laws 1909, p. 1115, § 10.

Vermont: Pub. St. 1906, §§ 2750-2752.

Wyoming: Mullen's St. 1910, § 5421.

statutes, the will may usually be offered for probate by any person interested thereunder. This includes the assignee of a share in a devise,² and a subsequent purchaser of the estate of the deceased.³ Such offer of probate may be made by the agent of an interested party.⁴

Generally the statutes are so worded that the probate of a will in one state will not operate to pass the title to real property situated in another state without re-probate in the latter jurisdiction.⁵ It is also frequently provided that while proof of foreign probate is sufficient to admit the will to probate in the second jurisdiction as a will of personalty, it cannot be probated as a will affecting realty in the second jurisdiction, unless evidence was produced before the foreign court sufficient to have established the will as a valid will of realty in the second jurisdiction had it been originally offered for probate in that jurisdiction.⁶ In other jurisdictions, the foreign probate is apparently conclusive both as to real and personal property,⁷ while in others the record of the foreign probate, duly authenticated, may be given in evidence to establish a title to land without re-probate,⁸ and again, in others, the duly probated foreign will, if executed in accordance with their laws, passes title to realty in those jurisdictions, without registration.⁹

It is also frequently provided by statute that a duly authenticated copy of a foreign will and of the probate thereof, may be recorded in the county where the land devised is situated, and that, upon

² In re Engle's Estate, 124 Cal. 292, 56 Pac. 1022.

³ Mower v. Verplanke, 105 Mich. 398, 63 N. W. 302. And he need not set forth the proofs of his interest as such purchaser. Id.

⁴ Evansville Ice & Cold Storage Co. v. Winsor, 148 Ind. 682, 48 N. E. 592; Clow v. Plummer, 85 Mich. 550, 48 N. W. 795.

⁵ Barr v. Chapman, 30 Wkly. Law Bul. (Ohio) 264; Fleming v. Hoffman, 8 Ohio N. P. 86; Walton v. Hall's Estate, 66 Vt. 455, 29 Atl. 803; De Roux v. Girard (C. C.) 105 Fed. 798.

⁶ Dupoyster v. Gaganl, 84 Ky. 403, 1 S. W. 652; In re Nash's Will, 37 Misc. Rep. 706, 76 N. Y. Supp. 453; Lockwood v. Lockwood, 51 Hun, 337, 3 N. Y. Supp. 887, 2 L. R. A. 425 (construing Laws 1864, c. 311, amended by Laws 1872, c. 680); In re Clayson's Will, 24 Or. 542, 34 Pac. 358 (construing Hill's Code, §§ 3082, 3083); Thrasher v. Ballard, 33 W. Va. 285, 10 S. E. 411, 25 Am. St. Rep. 894.

⁷ See Corrigan v. Jones, 14 Colo. 311, 23 Pac. 913; Irwin's Appeal, 33 Conn. 128; Gardner v. Ladue, 47 Ill. 211, 95 Am. Dec. 487; Succession of Gaines, 45 La. Ann. 1237, 14 South. 233; Lyon v. Ogden, '85 Me. 374, 27 Atl. 258; Wilt v. Cutler, 38 Mich. 189; Babcock v. Collins, 60 Minn. 73, 61 N. W. 1020, 51 Am. St. Rep. 503.

⁸ See Currell v. Villars (C. C.) 72 Fed. 330 (construing Mill. & V. Code Tenn. §§ 3012, 4550); Harris v. Anderson, 9 Humph. (Tenn.) 779; Newman v. Willets, 52 Ill. 98; Lewis v. City of St. Louis, 69 Mo. 595.

⁹ Bleldorn v. Mining Co., 89 Tenn. 166, 204, 15 S. W. 737.

such record, the title to the lands shall pass as effectually as though the will were duly probated in the jurisdiction wherein the lands are located.¹⁰ Such statutes have been construed, however, as merely making the transcript of the foreign probate competent evidence as to the facts of the probate, leaving the effect of the will itself to be determined as if the original were produced,¹¹ and its validity then depends upon its conformity to the law of the jurisdiction where the land is situated.¹²

Statutes providing for the allowance and record of wills admitted to probate in another jurisdiction do not apply where the testator's domicile, at the time of his death, was within the state, and therefore the will of a domiciled citizen, probated elsewhere, will be denied admission to probate or record when offered as a foreign will,¹³ although executed in the foreign jurisdiction, where testator died leaving property.¹⁴

When a will, probated in a foreign jurisdiction, is admitted to probate in another, the validity of the second probate cannot be attacked collaterally, but only by a proceeding brought directly for that purpose.¹⁵

Where a will operates upon property in a jurisdiction other than that of the testator's domicile, it usually may be admitted to probate in such jurisdiction, upon proper proof, without being first pro-

¹⁰ See *Harrison v. Weatherby*, 180 Ill. 418, 54 N. E. 237; *Gemmell v. Wilson*, 40 Kan. 764, 20 Pac. 458; *Slayton v. Singleton*, 72 Tex. 209, 9 S. W. 876; *Wells Fargo & Co. v. Walsh*, 88 Wis. 534, 60 N. W. 824.

Until such record, the probate of the will in the foreign state is no notice of its existence or contents to parties in the state where the land is located; and a purchaser, without notice, from an heir, cannot be affected thereby. *Slayton v. Singleton*, *supra*.

¹¹ *Nelson v. Potter*, 50 N. J. Law, 324, 15 Atl. 375.

¹² *Lindley v. O'Reilly*, 50 N. J. Law, 636, 15 Atl. 379, 1 L. R. A. 79, 7 Am. St. Rep. 802.

¹³ *Zollkofer's Will*, 167 Cal. 196, 138 Pac. 995; *CLARK'S ESTATE*, 148 Cal. 108, 82 Pac. 760, 1 L. R. A. (N. S.) 996, 113 Am. St. Rep. 197, 7 Ann. Cas. 306, *Dunmore Cas. Wills*, 193; *Succession of Drysdale*, 121 La. 816, 46 South. 873; *Sturdivant v. Neill*, 27 Miss. 157. See, also, *Scripps v. Wayne Probate Judge*, 131 Mich. 265, 90 N. W. 1061, 100 Am. St. Rep. 614.

¹⁴ *Bate v. Incisa*, 59 Miss. 513.

¹⁵ *Goldtree v. McAlister*, 86 Cal. 93, 23 Pac. 207, 24 Pac. 801; *Stull v. Veatch*, 236 Ill. 207, 86 N. E. 227; *Houser v. Paducah Lands Co.*, 157 Ky. 252, 162 S. W. 1113; *Lyon v. Gleason*, 40 Minn. 434, 42 N. W. 286; *Appeal of Pennsylvania Co.*, 139 Pa. 132, 20 Atl. 1050.

Provisions are sometimes expressly made respecting the contest of foreign wills. See *Evansville Ice & Cold Storage Co. v. Winsor*, 148 Ind. 682, 48 N. E. 592 (construing Burns' Rev. St. 1894, §§ 2770, 2771). See *Martin v. Stovall*, 103 Tenn. 1, 52 S. W. 296, 48 L. R. A. 130; *Babcock v. Collins*, 60 Minn. 73, 61 N. W. 1020, 51 Am. St. Rep. 503; *Dew v. Dew*, 23 Tex. Civ. App. 676, 57 S. W. 926.

bated in the testator's domicile.¹⁶ But, unless there is property situated in the jurisdiction, it is error to there admit to probate a foreign will, even though it has been probated in the testator's domicile.¹⁷ And, under statutes providing for the granting of letters testamentary under a foreign will, the court may, in the exercise of its discretion, refuse such letters to the foreign executor, as in case of acts of bad faith or of adverse interest on his part,¹⁸ the statutes requiring the issuing of letters testamentary to the executor named in a will, if he be legally competent, applying to domestic, and not to foreign wills.¹⁹

¹⁶ *Jaques v. Horton*, 76 Ala. 238; *Parnell v. Thompson*, 81 Kan. 119, 105 Pac. 502, 33 L. R. A. (N. S.) 658; *Knight v. Hollings*, 73 N. H. 495, 63 Atl. 38; *Gordon's Case*, 50 N. J. Eq. 397, 26 Atl. 268; *In re Clayson's Estate*, 26 Wash. 253, 66 Pac. 410.

Although property is left within the state, it is sometimes required that a foreign will first be probated at testator's domicile, *Corning's Will*, 159 Mich. 474, 124 N. W. 514; and sometimes the will must first be established at the testator's domicile, unless special reasons are set forth why the application for ancillary probate is made without waiting for probate at the domicile. *Rackemann v. Taylor*, 204 Mass. 394, 90 N. E. 552.

¹⁷ *In re Southard's Will*, 48 Minn. 37, 50 N. W. 932.

¹⁸ *Hardin v. Jamison*, 60 Minn. 112, 61 N. W. 1018.

¹⁹ *Hardin v. Jamison*, *supra*.

CHAPTER XII

ACTIONS FOR THE CONSTRUCTION OF WILLS

101. Actions to Construe—Who may Bring.

ACTIONS TO CONSTRUE—WHO MAY BRING

101. Any person interested in the determination of the meaning and effect of the provisions of a will is generally permitted to bring suit for construction in a court of competent jurisdiction, in cases where the meaning or effect is open to doubt, provided that the necessity of construction is immediate and certain, and not remote and contingent.

A bill in equity for the construction of a will will be dismissed when the instrument is free from doubt,¹ or when the petitioning executors have no concern with the property involved in any event,² or when a full distribution has been made and the estate finally settled,³ or when the action involves only a purely abstract question,⁴ or when the complaint contains no allegation that there will be any funds to be distributed under the construction contended for.⁵ The courts cross no bridges until they come to them, neither do they encourage litigants to undertake their passage under such circumstances. Hence they decline to construe wills where there is no present necessity for such construction,⁶ as where there

¹ *Haseltine v. Shepherd*, 99 Me. 495, 59 Atl. 1025; *Baxter's Ex'rs v. Baxter*, 43 N. J. Eq. 82, 10 Atl. 814.

² *Burgess v. Shepherd*, 97 Me. 522, 55 Atl. 415; *Norris v. Beardsley* (N. J. Ch.) 62 Atl. 425; *Tyson v. Tyson*, 100 N. C. 360, 6 S. E. 707.

³ *Miles v. Strong*, 60 Conn. 393, 22 Atl. 959. Here, after settlement as indicated, the executor brought suit for the construction of the will to ascertain the estate which passed to one of the devisees.

⁴ *Thompson v. Remsen*, 27 Misc. Rep. 279, 58 N. Y. Supp. 424. But see *Williams v. Williams*, 73 Cal. 99, 14 Pac. 394.

⁵ *Hawes v. Kepley*, 28 Ind. App. 306, 62 N. E. 720.

⁶ *Brooks v. Hanna*, 19 Ohio Cir. Ct. R. 216; *POLL v. CASH*, 234 Ill. 53, 84 N. E. 719, *Dunmore Cas. Wills*, 198; *Kellogg v. Burnett* (1908) 74 N. J. Eq. 304, 69 Atl. 196; *Stewart v. Stewart*, 61 N. J. Eq. 25, 47 Atl. 633. See, however, *Kaplan v. Coleman*, 180 Ala. 267, 60 South. 885, where court took jurisdiction in advance of any actual dispute as to construction of will.

is no proof that any controversy has actually arisen,⁷ or where the construction asked for by executors relates to their duties upon a possible future state of facts,⁸ or upon a state of facts which, though certain, is yet remote,⁹ or where the question hinges upon a contingency which may never arise.¹⁰ And a court will not undertake to construe a will on a bill in equity therefor, pending proceedings for the re-examination of the probate.¹¹

An action cannot be brought for the construction of a will when the only question involved is one of fact as to who are the heirs at law and next of kin of the testator,¹² or how much is needed for the support of a wife, under a will directing that the testator's wife should have so much of the estate as should be required for that purpose.¹³ So, in a bill for the construction of a will, the court will not determine the validity of assignments made by the bene-

⁷ *Ex parte Whalen* (Ky.) 39 S. W. 35. Compare *Hanna v. Prewitt*, 153 Ky. 310, 155 S. W. 726.

⁸ *Cochrane v. Schell*, 64 Hun, 576, 19 N. Y. Supp. 424.

⁹ *Morse v. Lyman*, 64 Vt. 167, 24 Atl. 763 (where interest was to be paid to certain legatees for 10 years, "then the principal to become theirs," and a bill was brought, immediately after the death of the testator, asking advice as to the distribution of the principal). See, also, *Siddall v. Harrison*, 73 Cal. 560, 15 Pac. 130; *Gafney v. Kenison*, 64 N. H. 354, 10 Atl. 706. So where property is left in trust during the life of the testator's wife, and on her death to be divided among certain heirs, no adjudication can be had as to deductions to be made from the respective shares of the distributees during the life of the wife. *In re Hano's Estate*, 22 Pa. Co. Ct. R. 561. See, also, *Archambault's Estate*, 232 Pa. 344, 81 Atl. 313. But where, by will, certain property was, on the happening of a contingency, to be divided among the issue of E., the latter to have the income of the property for life should she be living when the contingency happened, and there was no further direction as to the disposition of the principal after her death, in a suit for the construction of the will it was proper for the court to pass on the disposition of the property after her death, she being then 55 years old and without issue. *Farmers' Loan & Trust Co. v. Ferris*, 67 App. Div. 1, 73 N. Y. Supp. 475.

¹⁰ *Huston v. Dodge*, 111 Me. 246, 88 Atl. 888; *Horton v. Cantwell*, 108 N. Y. 255, 15 N. E. 546; *Wahl v. Brewer*, 80 Md. 237, 30 Atl. 654; *Selbert v. Miller*, 34 App. Div. 602, 55 N. Y. Supp. 593. In the last case a bequest provided that, if the legatee was under age when the legacy became payable, he should receive \$1,000 a year until his majority, and if he died without issue before majority the legacy should be paid to another. In the suit brought by the legatee, while an infant, for the construction of the will, it was held that the question as to the distribution of the income in excess of \$1,000 in event of his death without issue would not be determined, in view of the fact that it could not be assumed that the legatee would die without issue before attaining his majority.

¹¹ *Gebhard v. Lenox Library* (1907) 74 N. H. 416, 68 Atl. 540.

¹² *Crouse v. Wilson*, 73 Hun, 353, 26 N. Y. Supp. 923.

¹³ *Hull v. Hull*, 122 Mich. 338, 81 N. W. 89; *Bailey v. McIntire*, 71 N. H. 329, 52 Atl. 446.

ficiaries,¹⁴ nor give directions as to the compensation of the executors for future services as trustees under the will.¹⁵

Jurisdiction

In the absence of legislation to that effect, and such legislation is not infrequent,¹⁶ a probate court has no jurisdiction over a suit for the construction of a will.¹⁷ But whenever construction is involved in the settlement and distribution of the estate of the testator, power to construe may and must be exercised by such court, as incident to the settlement of the estate.¹⁸ It is evident that no legacies can be ordered paid until the rights of the legatees are first determined, and such determination involves the consideration of the testator's intention,¹⁹ and whether the bequest is valid,²⁰ or adeemed.²¹ "It is the decree of distribution that determines the rights of the distributees and legatees; hence such order or decree is conclusive as to their rights, subject only to be set aside or modified on appeal."²² But this power of construction by the probate court extends only to the determination of the parties to whom the executor must pay the funds in the first instance, and not to the adjudication of questions between the legatees themselves, such as whether the legacy is absolute or for life only, or subject to trusts or conditions.²³

¹⁴ *Jackson v. Thompson*, 84 Me. 44, 24 Atl. 459; *Page v. Marston*, 94 Me. 342, 47 Atl. 529; nor of a mortgage on testator's land, *Crosgrove v. Crosgrove*, 69 Conn. 416, 38 Atl. 219.

¹⁵ *Blundell v. Pope* (N. J.) 21 Atl. 456.

¹⁶ See Code Civ. Proc. N. Y. § 2624, 2 Gen. St. N. J. 1805, p. 2391, § 151, construed in *Stevens v. Dewey*, 55 N. J. Eq. 232, 36 Atl. 825. See, also, *In re Baker's Estate*, 61 N. J. Eq. 592, 47 Atl. 1046; *Hill v. Bloom*, 41 N. J. Eq. 276, 7 Atl. 438.

¹⁷ *Skelf's Heirs v. Ohall* (1911) 99 Ark. 339, 138 S. W. 461; *Chadwick v. Chadwick*, 6 Mont. 566, 13 Pac. 385; *Washbon v. Cope*, 144 N. Y. 287, 39 N. E. 388.

¹⁸ *Vestry of St. John's Parish v. Bostwick*, 8 App. D. C. 452; *Ward v. Congregational Church*, 66 Vt. 490, 29 Atl. 770; *Allen v. Barnes*, 5 Utah, 100, 12 Pac. 912. See, also, *Conkling v. Asylum*, 166 N. Y. 593, 59 N. E. 1120 (holding that in an action in the Supreme Court for the construction of a will no judgment would be rendered as to whether certain bequests were barred by the statute of limitations, the proper place for the settlement of the estate and to obtain a decree for the payment of legacies being the surrogate's court).

¹⁹ 1 Woerner, *Am. Law of Administration*, 351; *Goldtree v. Allison*, 119 Cal. 344, 51 Pac. 561; *Byrne v. Humé*, 84 Mich. 185, 47 N. W. 679; *Appeal of Schaeffner*, 41 Wis. 260.

²⁰ *Johnson's Adm'r v. Longmire*, 39 Ala. 143.

²¹ *May's Heirs v. May's Adm'r*, 28 Ala. 141.

²² 1 Woerner, *Am. Law of Administration*, 351; *Goad v. Montgomery*, 119 Cal. 552, 51 Pac. 681, 63 Am. St. Rep. 145.

²³ *Bramell v. Cole*, 130 Mo. 201, 37 S. W. 924, 58 Am. St. Rep. 619.

Testamentary construction of itself does not constitute an independent ground of equity jurisdiction, but is only an incident to the court's jurisdiction on some one of the recognized grounds.²⁴ Accordingly, in the absence of a statute enlarging their powers in this respect, courts of equity generally exercise power to construe only wills which create trusts either expressly or by necessary implication.²⁵ When the necessary relief can be obtained by a common-law action, the powers of equity are not to be invoked. Thus, the remedy of an administrator who doubts the power of a legatee to dispose of bonds bequeathed by the testator is by an action to recover the same from the transferees of the legatee, and not by a bill for the construction of the will, to which the transferees are parties.²⁶ So a court of equity will not assume jurisdiction to construe a will at the instance of an executor who takes no estate in the property disposed of and is charged with no duty in relation to it,²⁷ nor where an executor asks advice as to the legal rights of devisees.²⁸ And a request to construe with a view to seeing if the will creates a trust does not give equity jurisdiction.²⁹ But where a trust is involved equity has jurisdiction,³⁰ and this whether the plaintiff seeks to maintain the trust or to destroy it.³¹

²⁴ *Bevans v. Bevans*, 69 N. J. Eq. 1, 59 Atl. 896; *Hart v. Darter* (1907) 107 Va. 310, 58 S. E. 590, 15 L. R. A. (N. S.) 599, 13 Ann. Cas. 1; *Buskirk v. Ragland*, 65 W. Va. 749, 65 S. E. 101.

²⁵ *Miller v. Rowan*, 251 Ill. 344, 96 N. E. 285; *Ludwig v. Bungart*, 26 Misc. Rep. 247, 56 N. Y. Supp. 51; *Mellen v. Banning*, 60 Hun, 151, 14 N. Y. Supp. 665; *Monarque v. Monarque*, 80 N. Y. 320; *Simmons v. Burrell*, 8 Misc. Rep. 388, 28 N. Y. Supp. 625; *Tallman v. Tallman*, 3 Misc. Rep. 465, 23 N. Y. Supp. 734; *Whitney v. Whitney*, 63 Hun, 59, 18 N. Y. Supp. 3; *Woodlief v. Merritt*, 96 N. C. 226, 2 S. E. 350; *Hollister v. Howe*, 6 Ohio Dec. 157; *Chase v. Isherwood*, 1 Ohio N. P. 31. See *Blair v. Johnson's Heirs*, 64 Vt. 598, 24 Atl. 764.

²⁶ *Avery v. Mabey*, 62 Hun, 619, 16 N. Y. Supp. 607. And see *Kalish v. Kalish*, 45 App. Div. 528, 61 N. Y. Supp. 448.

²⁷ *Torrey v. Torrey*, 55 N. J. Eq. 410, 36 Atl. 1084.

²⁸ *Greeley v. City of Nashua*, 62 N. H. 166.

²⁹ *Edgar v. Edgar*, 26 Or. 65, 37 Pac. 73.

³⁰ *Minkler v. Simons*, 172 Ill. 323, 50 N. E. 176; *Miller v. Drane*, 100 Wis. 1, 75 N. W. 413; *Zabriskie v. Huyler*, 62 N. J. Eq. 697, 51 Atl. 197; *Kalish v. Kalish*, 166 N. Y. 368, 59 N. E. 917; *Read v. Williams*, 125 N. Y. 560, 26 N. E. 730, 21 Am. St. Rep. 748, distinguishing *Chipman v. Montgomery*, 63 N. Y. 221; *Eldred v. Meek*, 183 Ill. 26, 55 N. E. 536, 75 Am. St. Rep. 86.

A suit for construction by a trustee is properly brought in the county of testator's residence, where will was probated, although none of the parties reside in the state. *Bartlett v. Sears*, 81 Conn. 34, 70 Atl. 33.

³¹ *Simmons v. Burrell*, 8 Misc. Rep. 388, 28 N. Y. Supp. 625. Contra: *Jones v. Richards*, 24 Misc. Rep. 625, 54 N. Y. Supp. 126. See *Horton v. Cantwell*, 108 N. Y. 255, 15 N. E. 546.

However, in some jurisdictions courts of equity are regarded as having power to construe wills, independent of the existence of any question of trust,³² and when the construction of a will is incidental to the relief sought by a bill of which the court has jurisdiction, the court has jurisdiction to construe the will, although no question of trust is involved.³³

Parties

In nearly all jurisdictions, any person who is interested under the will may bring a suit for the construction of the instrument,³⁴ as may a trustee of a beneficiary.³⁵ Heirs at law or next of kin are sometimes permitted to maintain a suit for the construction of a will;³⁶ but under the New York statute,³⁷ an heir of the testator, not a beneficiary, who contests the validity of a devise, cannot sue in equity for the construction of the will,³⁸ neither can a party claiming title to land through a devisee.³⁹ In practice, a suit for construction is commonly brought by the executor.⁴⁰ And in an action by an executor for this purpose a coexecutor must be joined, or be made a party defendant if he withhold his consent.⁴¹

Following the general rule in equity, all persons interested must be made parties defendant,⁴² such as life tenants and remainder-

³² *Hanna v. Prewitt*, 153 Ky. 310, 155 S. W. 726; *Crosson v. Dwyer*, 9 Tex. Civ. App. 482, 30 S. W. 929; *Covert v. Sebern*, 73 Iowa, 564, 35 N. W. 636.

³³ *King v. King*, 215 Ill. 100, 74 N. E. 89; *Rowley v. Rowley*, 143 Wis. 325, 127 N. W. 1002.

³⁴ *McCutcheon v. Pullman Trust & Savings Bank*, 251 Ill. 550, 96 N. E. 510; *Crerar v. Williams*, 145 Ill. 625, 34 N. E. 467, 21 L. R. A. 454; *Healy v. Reed*, 153 Mass. 197, 26 N. E. 404, 10 L. R. A. 766; *St. John v. Andrews Institute for Girls*, 192 N. Y. 382, 85 N. E. 143.

A few decisions limit the right to bring suit for construction to executors and trustees. *Belfield v. Booth*, 63 Conn. 299, 27 Atl. 585; *Security Co. v. Pratt (C. C.)* 64 Fed. 405.

³⁵ *Glasscock v. Tate*, 107 Tenn. 486, 64 S. W. 715; *Davis v. Inhabitants of Barnstable*, 154 Mass. 224, 28 N. E. 165.

³⁶ *Healy v. Reed*, 153 Mass. 197, 26 N. E. 404, 10 L. R. A. 766.

³⁷ Code Civ. Proc. § 1866.

³⁸ *Ruppel v. Schlegel*, 55 Hun, 183, 7 N. Y. Supp. 936. See *Horton v. Cantwell*, 108 N. Y. 255, 15 N. E. 546.

³⁹ *Mellen v. Mellen*, 139 N. Y. 210, 34 N. E. 925.

⁴⁰ *Belfield v. Booth*, 63 Conn. 299, 27 Atl. 585; *Stoff v. McGinn*, 178 Ill. 46, 52 N. E. 1048; *Parsons v. Millar*, 189 Ill. 107, 59 N. E. 606; *Ladd v. Chase*, 155 Mass. 417, 29 N. E. 637; *In re Batchelder*, 147 Mass. 465, 18 N. E. 225; *Kilburn v. Dodd (N. J. Ch.)* 30 Atl. 868; *Balsley v. Balsley*, 116 N. C. 472, 21 S. E. 954; *Wood v. Hammond*, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198; *Thornton v. Zea (Tex. Civ. App.)* 39 S. W. 595.

⁴¹ *Benner v. Benner*, 58 Hun, 609, 12 N. Y. Supp. 472; *Sawtelle v. Ripley*, 85 Wis. 72, 55 N. W. 156.

⁴² *Davis v. Inhabitants of Barnstable*, 154 Mass. 224, 28 N. E. 165; *Torrey v. Torrey*, 55 N. J. Eq. 410, 36 Atl. 1084; *Adams v. Becker*, 47 Hun, 65.

men,⁴³ devisees and legatees,⁴⁴ and parties claiming title under a power conferred upon the executor.⁴⁵ So, in a suit brought by another than the executor, the latter is a necessary party defendant.⁴⁶ But in a suit brought by the executor, attaching creditors of the devisees are not necessary parties.⁴⁷ Heirs at law and next of kin of the testator should be made parties if there is any question whether the will disposes of the property involved.⁴⁸

Procedure—Pleading—Decree

Action for the construction of a will is generally brought by bill or petition, the matter being regulated by local statute, as is also the question of notice and service on parties defendant. Reference may be had to a master or referee, under statutes and rules of court for that purpose. No reference should be had, however, for the purpose of stating an account of advancements chargeable to one of the beneficiaries.⁴⁹ A referee's finding as to the testator's intention is reviewable by the court as a question of law.⁵⁰

The bill or petition asking for construction of a will must set forth the entire will to enable the court to determine testator's intention from a consideration of all parts of the will,⁵¹ and there must be an allegation that will has been established in a court of probate.⁵²

The decree or judgment of the court is binding upon the parties to the suit and those claiming under them,⁵³ and therefore cannot be attacked collaterally.⁵⁴ Appeal or writ of error will lie when the construction of the court of first instance is deemed wrong by any party thereby aggrieved.⁵⁵

⁴³ *Security Co. v. Pratt*, 65 Conn. 161, 32 Atl. 396.

⁴⁴ *Lomerson v. Vroom*, 42 N. J. Eq. 290, 11 Atl. 13; *Read v. Patterson*, 44 N. J. Eq. 211, 14 Atl. 490, 6 Am. St. Rep. 877.

⁴⁵ *Hill v. Dade*, 68 Ark. 409, 59 S. W. 39.

⁴⁶ *LUMPKIN v. LUMPKIN* (1908) 108 Md. 470, 70 Atl. 238, 25 L. R. A. (N. S.) 1063, *Dunmore Cas. Wills*, 200; *Duclos v. Benner*, 53 Hun, 636, 6 N. Y. Supp. 293.

⁴⁷ *Phelps v. Phelps*, 143 Mass. 570, 10 N. E. 452.

⁴⁸ *Lomerson v. Vroom*, 42 N. J. Eq. 290, 11 Atl. 13; *McKethan v. Ray*, 71 N. C. 165.

⁴⁹ *Marquise De Portes v. Hurlbut*, 44 N. J. Eq. 517, 14 Atl. 891.

⁵⁰ *Bills v. Putnam*, 64 N. H. 554, 15 Atl. 138.

⁵¹ *Clupper v. Clupper*, 163 Ind. 418, 72 N. E. 125; *Devenney v. Devenney*, 74 Ohio St. 96, 77 N. E. 688.

⁵² *Kaplan v. Coleman*, 180 Ala. 267, 60 South. 885.

⁵³ *Luscomb v. Fintzelberg*, 162 Cal. 433, 123 Pac. 247; *Coghlan v. Dana*, 173 Mass. 421, 53 N. E. 890; *Triba v. Lass*, 146 Wis. 202, 131 N. W. 357.

⁵⁴ *Demuth v. Kemp*, 159 App. Div. 422, 144 N. Y. Supp. 690; *Goodloe v. Woods*, 115 Va. 540, 80 S. E. 108.

⁵⁵ *Stratton v. McKinnie* (Tenn. Ch. App.) 62 S. W. 636. An executor, who

Costs

In suits for the construction of wills, the matter of costs frequently rests largely in the discretion of the court,⁵⁶ and is sometimes regulated by statute.⁵⁷ Under statutes, costs are sometimes allowed to both parties out of the estate,⁵⁸ and they are occasionally, and perhaps generally, thus allowed, where the suit is brought in good faith, and a genuine question is raised, without the help of a statute.⁵⁹ But where there is no ambiguity costs will be allowed the defendant executor, but not to the claimants.⁶⁰

A more marked diversity of opinion exists regarding the payment of counsel fees. While such fees are allowed to the executor out of the estate, whether he be plaintiff or defendant,⁶¹ yet it is sometimes denied that they can be thus allowed to any other party.⁶² Such fees are never allowed when the action is not brought in good faith,⁶³ or is clearly unnecessary.⁶⁴ But where the case is not frivolous or unnecessary, there is considerable authority to the effect that moderate counsel fees may be allowed, even to the defeated party, from the estate.⁶⁵

brings suit to determine which of two contending legatees is entitled to a certain fund, has no interest sufficient to entitle him to appeal from a judgment construing the will in favor of one of the legatees. *Barth v. Richter*, 12 Colo. App. 365, 55 Pac. 610.

⁵⁶ *Singer v. Taylor*, 91 Kan. 190, 137 Pac. 931, Ann. Cas. 1915C, 713; *Dill v. Wisner*, 88 N. Y. 153.

⁵⁷ Gen. St. Conn. 1902, § 781, authorizing the taxation of expenses and counsel fees as costs in actions for the construction of wills, construed in *Horton v. Upham*, 72 Conn. 29, 43 Atl. 492.

⁵⁸ *In re Donges' Estate*, 103 Wis. 497, 79 N. W. 786, 74 Am. St. Rep. 885, construing St. Wis. 1911, § 2949.

⁵⁹ *Thomas v. Trust Co.*, 73 Md. 451, 21 Atl. 367, 23 Atl. 3; *In re Stuart's Will*, 115 Wis. 294, 91 N. W. 688; *Woman's Union Missionary Soc. v. Mead*, 131 Ill. 33, 23 N. E. 603; *Lombard v. Whitbeck*, 173 Ill. 396, 51 N. E. 61; *Tiffany v. Emmet*, 24 R. I. 411, 53 Atl. 281; *Howard v. Smith*, 78 Iowa, 73, 42 N. W. 585; *Heard v. Read*, 169 Mass. 216, 47 N. E. 778; *Allison v. Allison's Ex'rs*, 101 Va. 537, 44 S. E. 904, 63 L. R. A. 920.

⁶⁰ *Merrill v. Hayden*, 86 Me. 133, 29 Atl. 949.

⁶¹ *Security Co. v. Pratt*, 65 Conn. 161, 32 Atl. 396; *Johnson v. Askey*, 190 Ill. 58, 60 N. E. 76; *Burney v. Atkinson* (Tenn. Ch. App.) 54 S. W. 998; *Cox v. Wills*, 49 N. J. Eq. 573, 25 Atl. 938; *Patton v. Ludington*, 103 Wis. 629, 79 N. W. 1073, 74 Am. St. Rep. 910; *In re Donges' Estate*, 103 Wis. 497, 79 N. W. 786, 74 Am. St. Rep. 885; *Lombard v. Whitbeck*, 173 Ill. 36, 51 N. E. 61.

⁶² *Patton v. Ludington*, supra; *Kimball v. Society*, 65 N. H. 139, 23 Atl. 83-85. See *Ensley v. Ensley*, 105 Tenn. 107, 58 S. W. 288.

⁶³ *Thornton v. Zea*, 22 Tex. Civ. App. 509, 55 S. W. 798. On the question of the good faith of the legatee in bringing suit, a contract made by him with his attorneys regarding their fees is admissible. *Id.*

⁶⁴ *Guess v. Strahan*, 106 Miss. 1, 63 South. 313.

⁶⁵ *Woman's Union Missionary Soc. v. Mead*, 131 Ill. 33, 28 N. E. 603; *Sing-*

Miscellaneous

A legatee cannot be deprived of his right to resort to the courts for the construction of a will by a declaration therein that the executors are to define its provisions.**

er v. Taylor, 91 Kan. 190, 137 Pac. 931, Ann. Cas. 1915C, 713; Charter v. Charter, L. R. 7 H. L. O. 364. And see Moore v. Alden, 80 Me. 301, 14 Atl. 199, 6 Am. St. Rep. 203; Cooke v. Woman's Medical College of Pa., 82 N. J. Eq. 179, 87 Atl. 131.

** In re Relly's Estate, 200 Pa. 288, 49 Atl. 939.

GARD. WILLS (2D ED.)—21

CHAPTER XIII

CONSTRUCTION OF WILLS—CONTROLLING PRINCIPLES

- 102-103. Construction Defined.
- 104. General Rules of Construction.
- 105. Extrinsic Evidence as Affecting Construction—General Rule.
- 106. Extrinsic Evidence Admissible, When.
- 107. Equivocations—Extrinsic Evidence of Intention.
- 108. Imperfect Description—Extrinsic Evidence.
- 109. Extrinsic Evidence Inadmissible, When.

CONSTRUCTION DEFINED

- 102. The will of a competent testator, and every part thereof, presumably expresses an intelligent intent; i. e., means something. When the language, in view of all the circumstances, can have but one meaning, there is no room for uncertainty.
- 103. Construction is the method employed to ascertain the intent of the testator, as expressed in the will, when the language used to that end is susceptible, under the circumstances, of more than one meaning. Its sole function is to remove uncertainty regarding testamentary intent.

The sole purpose of construction is to ascertain and effectuate the intent of the testator, not as it may have existed in his mind, not as he may have intended to express it, but as it is actually expressed in the language of the will.¹ It is very frequently said to

¹ In *re Willey's Estate*, 128 Cal. 1, 60 Pac. 471; *Hertz v. Abrahams*, 110 Ga. 707, 36 S. E. 409, 50 L. R. A. 361; *Sumpter v. Carter*, 115 Ga. 893, 42 S. E. 324, 60 L. R. A. 274; *Engelthaler v. Engelthaler*, 196 Ill. 230, 63 N. E. 669; *Phayer v. Kennedy*, 169 Ill. 360, 48 N. E. 828; *Vestal v. Garrett*, 197 Ill. 398, 64 N. E. 345; *Dorsey v. Dodson*, 104 Ill. App. 589; *Summit v. Yount*, 109 Ind. 506, 9 N. E. 582; *Wentworth v. Fernald*, 92 Me. 282, 42 Atl. 550; *Page v. Marston*, 94 Me. 342, 47 Atl. 529; *Zimmerman v. Hafer*, 81 Md. 347, 32 Atl. 316; *Boston Safe-Deposit & Trust Co. v. Coffin*, 152 Mass. 95, 25 N. E. 30, 8 L. R. A. 740; *Yates v. Shern*, 84 Minn. 161, 86 N. W. 1004; *Briant v. Garrison*, 150 Mo. 655, 52 S. W. 361; *Turney v. Sparks*, 88 Mo. App. 363; *St. James Orphan Asylum v. Shelby*, 60 Neb. 796, 84 N. W. 273, 83 Am. St. Rep. 553; *Chick v. Ives*, 2 Neb. (Unof.) 879, 90 N. W. 751; *Stratton v. Stratton*, 68 N. H. 582, 44 Atl. 699; *Marshall's Ex'rs v. Hadley*, 50 N. J. Eq. 547, 25 Atl. 325; *Carter v. Gray*, 58 N. J. Eq. 411, 43 Atl. 711; *Hafner v. Hafner*, 171 N. Y. 633, 63 N. E. 1117; *Adair v. Adair*, 11 N. D. 175, 90 N. W. 804; *In re Hammer's Estate*, 158

be a cardinal rule of testamentary construction that the plain intent of the testator, as contained in the language of the will, must prevail, if it does not offend public policy, and many of the cases just cited contain this statement. But this is not in reality a rule of construction at all. All the rules of construction are aimed at ascertaining the intent. When the intent of the testator is plain, there is no room for any rule of construction, cardinal or otherwise, as there is nothing to construe.²

In applying the rules of construction, no effort is really made to get through the will back into the mind of the testator, to learn what intent may have been lurking there, or what intent he would have more clearly embodied in his will, had his attention been called to the uncertainty. As has been well pointed out,³ the testator may have been no more able to solve the doubt offhand than are the courts. The question is, "not what the testator meant, but what is the meaning of his words."⁴ Perhaps it might be said that the testator is conclusively presumed to have meant that which his words mean. At all events, it is the language of the will alone which is to be considered.⁵ Hence, if the words of the will clearly create one estate, it will have that effect, however much the testator may have designed to create another.⁶ So when the testamentary purpose is made known by plain and unambiguous language, it will be effectuated, however unreasonable, unjust, or absurd it may appear to others.⁷ No document can be fairly construed, when isolated from its surroundings or from the circumstances which gave rise to it. Hence the language of the will must be read and construed in the light of the circumstances of the particular case.⁸

Pa. 632, 28 Atl. 231; *Rozell v. Thomas* (Tenn. Ch.) 39 S. W. 350; *Rutter v. Anderson*, 48 W. Va. 215, 36 S. E. 357; *O'Hearn v. O'Hearn*, 114 Wis. 428, 90 N. W. 450, 58 L. R. A. 105; *Myrick v. Heard* (C. C.) 31 Fed. 241.

² See *Burroughs v. Jamieson*, 62 N. J. Eq. 651, 53 Atl. 688; *Adair v. Adair*, 11 N. D. 175, 90 N. W. 804; *Holmes v. Walter*, 118 Wis. 409, 95 N. W. 380, 62 L. R. A. 986.

³ Big. Wills, 155, note 3.

⁴ 2 Wms. Ex'rs, 1148. See *Martindale v. Warner*, 15 Pa. 471.

⁵ *Tucker v. Aid Soc.*, 7 Metc. (Mass.) 205; *Wright v. Barrett*, 13 Pick. (Mass.) 44; *Bond v. Moore*, 236 Ill. 576, 86 N. E. 386, 19 L. R. A. (N. S.) 540; *Jackson v. Luquere*, 5 Cow. (N. Y.) 228; *Walston's Lessee v. White*, 5 Md. 304; *Bailey v. Bailey*, 25 Mich. 185; *Edgeworth v. Edgeworth*, L. R. 4 H. L. 41; *Grey v. Pearson*, 6 H. L. Cas. 106.

⁶ *Hertz v. Abrahams*, 110 Ga. 707, 36 S. E. 409, 50 L. R. A. 361.

⁷ *Marshall's Ex'rs v. Hadley*, 50 N. J. Eq. 547, 25 Atl. 325.

⁸ *Canfield v. Canfield*, 118 Fed. 1, 55 C. C. A. 169; *Elyton Land Co. v. McElrath*, 3 C. C. A. 649, 53 Fed. 763. This topic will be discussed more fully in connection with evidence as an aid to construction. See post, p. 340.

GENERAL RULES OF CONSTRUCTION

104. As an aid to the removal of uncertainty in the meaning of the will, read in view of all the facts surrounding the testator, certain general rules of construction have been adopted, their sole aim being to disclose the testator's intent as embodied in the language of the will. The more important are as follows:

- (a) A will is generally presumed to speak from the time of the testator's death.
- (b) The general intention controls the particular intention.
- (c) A will once made, there is a presumption against partial intestacy.
- (d) Words are understood in their ordinary meaning, if there is nothing to indicate a contrary intent.
- (e) Technical words are understood as having their legal meaning, if there is nothing to indicate a contrary intent.
- (f) Each part of the will and its codicils is construed in connection with all the other parts, and effect is given to every part, if possible.
- (g) As between two irreconcilable parts, the latter will prevail.
- (h) To effectuate a manifest intention, a will may be read as if words were transposed, supplied, rejected, or changed.
- (i) Where there is any room for construction, that interpretation will be adopted which prefers the blood of the testator to that of strangers.
- (j) As between two possible constructions, that which discloses a legal or valid purpose will be preferred to one disclosing an illegal or invalid purpose.
- (k) If the language of the will gives rise to a necessary implication that a gift was intended, such intention will be effectuated, though no gift is, in express terms, bestowed.
- (l) An express gift cannot be controlled by the reasons assigned therefor.

These rules are resorted to only when there is at least a possible question as to the testator's intent. The following are the more important general rules of construction:

First

A will is generally presumed to speak from the time of the testator's death,⁹ for the very nature of the testamentary act, which

⁹ DOWNING v. GRIGSBY, 251 Ill. 568, 96 N. E. 513, Dunmore Cas. Wills, 208; Perry v. Perry, 110 Ky. 16, 60 S. W. 855 (by statute); Cox v. Jones (1910) 229 Mo. 53, 129 S. W. 495; McNaughton v. McNaughton, 34 N. Y. 201;

is expected to take effect only at the decease of the testator, presupposes that, so far as facts and circumstances are capable of anticipation by him so as to enable him to place himself in the position he will, then occupy relative to his property and his obligations to his family, he will have used the language of his will with reference more particularly to the facts and circumstances as existing at that period.¹⁰ Thus the words, "according to the statute of descents," qualifying a devise over to the testator's heirs, refer to the time the devise to such heirs takes effect, viz., the death of the testator.¹¹ So, upon probate of will, the title to property devised vests as of the death of the testator,¹² even though the testator be domiciled in a state other than that in which the land lies.¹³ And a reference in a will to the arrival of the testator's youngest child at the age of twenty-five years applies to the youngest child at the date of the testator's death, though born after the execution of the will;¹⁴ and, in general, the provisions of the will must be construed with reference to the law in force at the time of the testator's death.¹⁵ But the rule is inoperative when the will discloses a contrary intent,¹⁶ as where many parts of the will are meaningless if the clause in question is construed with reference to the time of the testator's death, but all are intelligible and significant under a different construction.¹⁷

Coggeshall v. Home for Friendless Children, 18 R. I. 696, 31 Atl. 694; *Carney v. Kain*, 40 W. Va. 758, 23 S. E. 650; *Hamilton v. Ritchie* (1894) App. Cas. 310.

¹⁰ *Gold v. Judson*, 21 Conn. 616; *Canfield v. Bostwick*, Id. 550.

¹¹ *DE WOLF v. MIDDLETON*, 18 R. I. 810, 26 Atl. 44, 31 Atl. 271, 31 L. R. A. 146, *Dunmore Cas. Wills*, 269.

¹² *Graves v. Mitchell*, 90 Wis. 306, 63 N. W. 271; *In re Brown's Estate*, 190 Pa. 464, 42 Atl. 890.

¹³ *Green v. Alden*, 92 Me. 177, 42 Atl. 358; *White v. Keller*, 15 C. C. A. 683, 68 Fed. 796. Of course, the will must in such cases be subsequently probated in the state where the land lies, or in some way be made operative under the laws of such state. See ante, p. 309.

¹⁴ *Louisville Trust Co. v. Dohn* (Ky.) 63 S. W. 785. See, also, *Gray's Adm'r v. Pash* (Ky.) 66 S. W. 1026, and *Breidenbach v. Walter's Ex'rs* (Ky. 1909) 119 S. W. 204 (where there was a gift over if certain beneficiaries "die or wander off and are not heard from for ten years," and the ten years were held to begin to run from testator's death).

¹⁵ *Meserve v. Meserve*, 63 Me. 518, 520; *Cushing v. Aylwin*, 12 Metc. (Mass.) 169; *Perkins v. George*, 45 N. H. 453.

¹⁶ *Bourke v. Boone*, 94 Md. 472, 51 Atl. 396; *In re Swenson*, 55 Minn. 300, 56 N. W. 1115.

¹⁷ *In re Gerber's Estate*, 196 Pa. 366, 46 Atl. 497.

So the word "now" or any word expressing present time is understood as referring to the date of the will. *Gold v. Judson*, 21 Conn. 616, 622; *In re Pearsons' Estate*, 99 Cal. 30, 33 Pac. 751. So "my present attending physician" means him in attendance at the date of the will. *Everett v. Carr*, 59 Me. 375. "Descendants now living" means those living at the date of the will.

Second

The general intention controls the particular intention, if there is an irreconcilable conflict between them, i. e., where the general intention is clear, and it is impracticable to effectuate all the language of the instrument as expressive of a special intent, the latter must yield to the former.¹⁸ And it makes no difference which intent is stated first in the will.¹⁹ Thus, where testator devised real estate to his son and made a gift over if his son "should die during minority *or* without issue," the court construed the word "*or*" as though it were "*and*"; it being apparent that the testator's principal object was to provide for his son and whatever family he might have.²⁰

Third

A testator, in making his will, presumably intends to dispose of all his property. Hence if the will can be so construed as to effect this result this construction will be resorted to, when there is any occasion to resort to construction at all. Briefly, there is a presumption against intestacy.²¹ Thus a will, making the testator's wife

1 Jar. Wills, 318. So with a gift "to the surviving children, not knowing all their names." *Morse v. Mason*, 11 Allen (Mass.) 36.

¹⁸ *Thrasher v. Ingram*, 32 Ala. 660; *Phelps v. Bates*, 54 Conn. 11, 5 Atl. 301, 1 Am. St. Rep. 92; *Rotch v. Emerson*, 105 Mass. 431; *Howland v. Howland*, 11 Gray (Mass.) 469, 476; *Everett v. Carr*, 59 Me. 332; *Brown v. Tuschoff*, 235 Mo. 449, 138 S. W. 497; *Yarnall's Appeal*, 70 Pa. 335; *Kane v. Astor's Ex'rs*, 7 N. Y. Super. Ct. 533; *Workman v. Cannon's Lessee*, 5 Har. (Del.) 91; *Chase v. Lockerman*, 11 Gill & J. (Md.) 206, 35 Am. Dec. 277; *Rose v. McHose's Ex'rs*, 26 Mo. 590; *Robinson v. Robinson*, 1 Burr. 38; *Pierson v. Vickers*, 6 East, 548.

In consequence of this principle, a devise in fee, clearly manifested, is not cut down by subsequent clauses or codicils, unless the testator's intention to effect this result is clearly inferable from the whole will. *Parker v. Iasigi*, 138 Mass. 416, 423; *Washbon v. Cope*, 144 N. Y. 287, 39 N. E. 388; *Bruce v. Bissell*, 119 Ind. 525, 22 N. E. 4, 12 Am. St. Rep. 436; *Bedford v. Bedford's Adm'r*, 99 Ky. 273, 35 S. W. 926.

¹⁹ *Cook v. Holmes*, 11 Mass. 528; *Chase v. Lockerman*, 11 Gill & J. (Md.) 185, 35 Am. Dec. 277; *Jesson v. Wright*, 2 Bligh, 56; *Price v. Cole's Ex'x*, 83 Va. 343, 2 S. E. 200.

²⁰ *Phelps v. Bates*, *supra*.

²¹ *Marion v. Williams*, 19 Wash. Law Rep. (D. C.) 532; *King v. King*, 168 Ill. 273, 48 N. E. 582; *Dorsey v. Dodson*, 104 Ill. App. 589; *English v. Cooper*, 183 Ill. 203, 55 N. E. 687; *Bourke v. Boone*, 94 Md. 472, 51 Atl. 396; *BATES v. KINGSLEY*, 215 Mass. 62, 102 N. E. 306, *Dunmore Cas. Wills*, 205, 230; *Smith v. Secor*, 157 N. Y. 402, 52 N. E. 179; *Kelley v. Hogan*, 71 App. Div. 343, 76 N. Y. Supp. 5; *In re Lloyd's Estate*, 188 Pa. 451, 41 Atl. 733; *Reynolds v. Crispin* (Pa.) 11 Atl. 236; *Carney v. Kain*, 40 W. Va. 758, 23 S. E. 650; *Lawrence v. Barber* (1903) 116 Wis. 294, 93 N. W. 30; *Canfield v. Canfield*, 55 C. C. A. 169, 118 Fed. 1; *Kenaday v. Sinnott*, 179 U. S. 606, 21 Sup. Ct. 233, 45 L. Ed. 339.

The fact that there is no residuary clause is sometimes said to strengthen

executrix and giving her full power to convey all the testator's property, with remainder over to an adopted son in such property as should not be thus disposed of by her, was construed as giving her a life estate in the property, as otherwise an estate to this extent would be undisposed of by will.²² So where in one part of a will a certain lot was devised to two daughters and some minor grandchildren of the testatrix, T., one of the daughters, being given all the personalty, and in another part of the will she revoked that portion of the will giving any part of the said lot to the other daughter and the minor grandchildren, it was held that she would not be presumed intestate as to any portion of the lot, but that T. took the whole of it.²³ But the intention to pass the whole estate must be expressed in some form in order to raise the presumption against intestacy²⁴ and the presumption has no controlling effect where the language of the will is plain and unambiguous.²⁵

Fourth

Where words have an ascertained, ordinary, and popular meaning, and there is nothing in the will indicating that they were not used in this sense, this meaning will be given them²⁶ unless such adherence leads to some absurdity, repugnance, or inconsistency with the rest of the instrument.²⁷ And such meaning will not be

this presumption as applied to the general words used in the dispositions made. *Felkel v. O'Brien*, 231 Ill. 329, 83 N. E. 170. See, also, *Matter of Reynolds*, 6 Dem. Sur. (N. Y.) 229.

²² *Hammond v. Croxton* (Ind. App.) 61 N. E. 596.

²³ *Marion v. Williams*, 20 App. D. C. 20. For further illustration, see *Trusty v. Trusty* (Ky.) 59 S. W. 1094; *Tebow v. Dougherty*, 205 Mo. 315, 103 S. W. 985; *Honaker v. Starks*, 114 Va. 37, 75 S. E. 741 (where will bequeathing "my stock [one share]" in a bank was held to pass all the shares of stock of testatrix).

²⁴ *Gallagher v. McKeague*, 125 Wis. 116, 103 N. W. 233, 110 Am. St. Rep. 821.

²⁵ *Wixon v. Watson*, 214 Ill. 158, 73 N. E. 306; *Powell v. Beebe*, 167 Mich. 306, 133 N. W. 8; *Oldham v. York*, 99 Tenn. 68, 41 S. W. 333. Thus, where a testatrix, in her will, stated that she understood that a fund bequeathed to her by her father and payable at her mother's death would descend to her son and daughter in equal amounts, and requested her son, in consideration of prior advances to him, to relinquish his share of the fund to the daughter, she was held to have died intestate as to this fund. *In re Sherman*, 2 Con. Sur. 504, 13 N. Y. Supp. 881.

²⁶ *Fancher v. Fancher* (1909) 156 Cal. 13, 103 Pac. 206; *Young v. Quimby*, 98 Me. 167, 56 Atl. 656; *Barrus v. Kirkland*, 8 Gray (Mass.) 512, 513; *McMurtrie v. McMurtrie*, 15 N. J. Law, 276; *Lillard v. Reynolds*, 25 N. C. 366; *Townsend v. Downer*, 23 Vt. 225; *Winder v. Smith*, 47 N. C. 327; *Abbott v. Middleton*, 7 H. L. Cas. 114; *Grey v. Pearson*, 6 H. L. Cas. 106; *Edgeworth v. Edgeworth*, L. R. 4 H. L. 37; *Hamilton v. Ritchie* (1894) App. Cas. 310.

²⁷ *Hileman v. Tuthill*, 97 Ill. App. 258, and cases in note 26.

departed from for the purpose of giving effect to what may be guessed to have been the intention of the testator, though such departure might result in a fairer distribution of the estate.²⁸ But the usual meaning will be departed from when it is necessary for the purpose of effectuating what appears, upon a full view of the whole will, to have been the intent of the testator.²⁹ Thus where the testator devises all of his land lying east of the center line running north and south between "sections 8 and 17, in a certain township and range, the court will take judicial notice that these sections lie to the north and south, the one of the other, and, to effectuate the evident intent of the testator, will construe the word "between" as meaning "through."³⁰

While there is no necessary inconsistency in construing the same word in different senses in the same will, if it is apparent that the word was thus used,³¹ yet it is prima facie taken as having the same meaning in each instance unless a contrary intent clearly appears.³² So where, in two clauses of a will, the word "heirs" is used as indicating a class, it will be given the same meaning in a third clause.³³ But the rule does not apply when the same words refer to different subject-matters.³⁴ Thus, if a technical word is shown by the context of the clause wherein it occurs to have a popular meaning, it will receive in another clause its technical meaning when there is nothing in the context of that clause to indicate a different intent.³⁵ And where there is no connection by

²⁸ *Adams v. Jones*, 176 Mass. 185, 57 N. E. 362. See, also, *Baker v. Baker* (1913) 182 Ala. 194, 62 South. 284.

²⁹ *Marshall's Ex'rs v. Hadley*, 50 N. J. Eq. 547, 25 Atl. 325; *In re Ehler's Will*, 155 Wis. 46, 143 N. W. 1050.

³⁰ *Briant v. Garrison*, 150 Mo. 655, 52 S. W. 361.

³¹ *Morrow v. McMahon* (Sup.) 71 N. Y. Supp. 961, 35 Misc. Rep. 348.

³² *Pease v. Cornell*, 84 Conn. 391, 80 Atl. 86; *Dunshee v. Dunshee*, 251 Ill. 405, 96 N. E. 298; *Elliot v. Carter*, 12 Pick. (Mass.) 436; *Mathes v. Smart*, 51 N. H. 438; *Carr v. Smith*, 161 N. Y. 636, 57 N. E. 1106; *Stewart v. Stewart*, 61 N. J. Eq. 25, 47 Atl. 633; *In re Birks*, 69 Law J. Ch. 124, [1900] 81 Law T. (N. S.) 741.

See, also, *Madison v. Larmon*, 170 Ill. 65, 48 N. E. 556, 62 Am. St. Rep. 356; *Allen's Appeal*, 69 Conn. 702, 38 Atl. 701; *In re Stumpenhousen's Estate*, 108 Iowa, 555, 79 N. W. 376; *In re McIntosh's Estate*, 158 Pa. 528, 27 Atl. 1044, 1047, 1048; *McMurry v. Stanley*, 69 Tex. 227, 6 S. W. 412.

Although testator later repeats words to which he has previously given a definite meaning, the presumption that the words are intended to carry the same meaning gives way to any indication of a different intent by the testator. *In re Altdorfer's Estate*, 225 Pa. 136, 73 Atl. 1068.

³³ *Preston v. Brant*, 96 Mo. 552, 10 S. W. 78.

³⁴ *Hawley v. Northampton*, 8 Mass. 3, 33, 5 Am. Dec. 66; *Schaefer v. Schaefer*, 141 Ill. 337, 31 N. E. 136.

³⁵ *Lloyd v. Rambo*, 35 Ala. 709. See *Woerner*, Am. Law of Administration,

grammatical construction, or direct words of reference, or by the declaration of a common purpose, between distinct bequests in a will, the general rule will not justify the resort to one bequest for aid in construing another, although the two may be similar in their general terms and import.³⁶ But the more modern tendency is to read the different clauses in a will referentially to one another, unless they are clearly independent.³⁷

Fifth

While technical legal words are not necessary to give effect to any species of disposition,³⁸ yet, if such words are used, they are read as having their legal sense, unless the will clearly indicates to the contrary.³⁹ But the intention of the testator controls. Where the word "heir" is obviously used as meaning children or descendants it must be given that meaning.⁴⁰ So it may also be understood as meaning legatee or devisee.⁴¹ So, when the term "devisee" is used in reference to a bequest of personalty, it will be held to mean legatee⁴² and the word "legatees" will be held to include both devisees and legatees, if such is intention of testator.⁴³

878. So where a testator devised real and personal estate to A., and if he should die, and *leave no issue of his body*, then over, the italicized words were held to mean no issue at the time of his death as applied to the personalty, but as applied to the realty an indefinite failure of issue. 1 P. Wms. 667. See 2 Wms. Ex'rs, 1158.

³⁶ Compton v. Compton, 9 East, 267; Pratt v. Leadbetter, 38 Me. 13; Cook v. Holmes, 11 Mass. 528, 531; 2 Wms. Ex'rs, 1159.

³⁷ 2 Wms. Ex'rs, 1160; Ford v. Ford, 6 Hare, 492; Bailey v. Bailey, 25 Mich. 185; Lebeau v. Trudeau, 10 La. Ann. 164; Lucas v. Duffield, 6 Grat. (Va.) 456. For the effect of the referential words, "as aforesaid," see Walsh v. Peterson, 3 Atk. 194; Meredith v. Meredith, 10 East, 503; "as before," Macnamara v. Lord Whitworth, Coop. 241; "in like manner," Aistrop v. Aistrop, 2 Bl. 1228; Tyndale v. Wilkinson, 23 Beav. 74; "in manner aforesaid," Co. Lit. 20b; Bessaub v. Noble, 26 L. J. Ch. 236; "on the same terms and conditions," Cross v. Woodhull, Willes, 592.

³⁸ Hay v. Coventry, 3 T. R. 86; 2 Wms. Ex'rs, 1149.

³⁹ De Bardelaben v. Dickson (1910) 166 Ala. 59, 51 South. 986; Ironside v. Ironside (1911) 150 Iowa, 628, 130 N. W. 414; Malcolm v. Malcolm, 3 Oush. (Mass.) 477; Hawley v. Northampton, 8 Mass. 3, 5 Am. Dec. 66; Moore v. Lyons, 25 Wend. (N. Y.) 119; Clark v. Mosely, 1 Rich. Eq. 396, 44 Am. Dec. 229; LEATHERS v. GRAY, 101 N. C. 162, 7 S. E. 657, 9 Am. St. Rep. 30, Dunmore Cas. Wills, 207, 255; In re France's Estate, 75 Pa. 220; Allison v. Allison's Ex'rs, 101 Va. 537, 44 S. E. 904, 63 L. R. A. 920; Collins v. Elstone, 1 Reports [1893] Prob. 1; Hodgson v. Ambrose, 1 Doug. 337.

⁴⁰ Canfield v. Fallon, 161 N. Y. 623, 55 N. E. 1093; Plummer v. Shepherd, 94 Md. 466, 51 Atl. 173.

⁴¹ Shapleigh v. Shapleigh, 69 N. H. 577, 44 Atl. 107 (where the will gave to a certain person the portion coming to the testator "as heir of F.," the latter having died testate, making the testator his residuary legatee and executor).

⁴² People v. Petrie, 191 Ill. 497, 61 N. E. 499, 85 Am. St. Rep. 268.

⁴³ In re Henderson's Estate (1911) 161 Cal. 353, 119 Pac. 496.

And the word "revert" may appear by the context to have another than its technical meaning.⁴⁴

In seeking to determine whether or not technical words are to be understood in their technical sense, the court may consider whether the drawer of the will was familiar with the technical meaning of the words used.⁴⁵

Sixth

A will is, presumably, a whole. Each part is therefore to be considered in connection with every other part. Each part also is presumed to have some operative force; it was not inserted for nothing. Hence the construction of the will is to be had with regard to the entire instrument, and each of the parts is to be construed with reference to all the others, so as to harmonize and give effect to all, if possible,⁴⁶ and the same rule applies to the will and its codicils.⁴⁷ Any reasonable construction that will uphold all the provisions of the will will be adopted.⁴⁸ Thus a devise of land to one, after a life estate in the same land to another, constitutes a devise of the remainder to the former.⁴⁹ So a devise to one daughter and her children, and if she died without heirs of her body then to another daughter and her children, followed by a devise of the testator's property to the two daughters and their heirs, is construed as vesting a fee in the first daughter, defeasible on her dying without children.⁵⁰ And where the same land is given in fee to two persons, the prevailing rule is that neither will take to the exclusion of the other, but both take as tenants in common,⁵¹ although, under such circumstances, some courts construe the will

⁴⁴ *In re Bennett's Estate*, 134 Cal. 320, 66 Pac. 370.

⁴⁵ *Hewitt v. Green*, 77 N. J. Eq. 345, 77 Atl. 25; *Cross v. Hoch*, 149 Mo. 325, 50 S. W. 786.

⁴⁶ *Denson v. Mitchell*, 26 Ala. 369; *Bacon v. Nichols*, 47 Colo. 31, 105 Pac. 1082; *Cook v. Weaver*, 12 Ga. 47; *Hubbard v. Hubbard*, 99 Ill. App. 555; *Huff v. Browning*, 96 Ill. App. 612; *Jackson v. Hoover*, 26 Ind. 511; *Ernst v. Foster*, 58 Kan. 438, 49 Pac. 527; *Gueydan v. Montagne*, 109 La. 38, 33 South. 61; *Rotch v. Emerson*, 105 Mass. 433; *Bailey v. Bailey*, 25 Mich. 185; *Perkins v. Mathes*, 49 N. H. 107; *In re Schott's Estate*, 78 Pa. 40; *Parker v. Wasley's Ex'r*, 9 Grat. (Va.) 477; *In re Prasser's Will*, 140 Wis. 92, 121 N. W. 643.

⁴⁷ *Hubbard v. Hubbard*, 99 Ill. App. 555; *Adams v. Legroo*, 111 Me. 302, 89 Atl. 63; *Ward v. Ward*, 105 N. Y. 68, 11 N. E. 373; *In re Noon's Estate* (1907) 49 Or. 286, 88 Pac. 673, 90 Pac. 673; *Vaughan v. Bridges*, 61 S. C. 155, 39 S. E. 347; *Thompson's Adm'r v. Churchill's Estate*, 60 Vt. 371, 14 Atl. 699; *Hunt v. Hunt*, 18 Wash. 14, 50 Pac. 578.

⁴⁸ *Furbee v. Furbee*, 49 W. Va. 191, 38 S. E. 511.

⁴⁹ *Crissman v. Crissman*, 27 N. C. 498.

⁵⁰ *Denson v. Mitchell*, 26 Ala. 360; *Ramsdell v. Ramsdell*, 21 Me. 288.

⁵¹ *Day v. Wallace*, 144 Ill. 256, 33 N. E. 185, 36 Am. St. Rep. 424; *McGuire v. Evans*, 40 N. C. (5 Ind. Eq.) 269; *Sherrat v. Bentley*, 2 Mylne & K. 165.

It is doubtful whether this doctrine extends to indivisible chattels or to a

as passing the whole estate to the devisee named in the clause which appears last in the will.⁵²

Seventh

But where it is impossible to give the will such a construction as will render every part of it effective, as between two irreconcilable and conflicting portions, the latter will prevail;⁵³ this on the obviously artificial theory that, as between the two, the later clause is the "last" will of the testator. Thus, where a clause of the will provided that, at the death of the testator's last remaining child, the property should be distributed, and a subsequent clause provided for distribution when all but one child was dead, certain securities, however, to be kept, from which an annuity should be paid to such surviving child until his death, the two clauses were held as partially inconsistent, and, the latter governing, distribution should be made upon the death of the last child but one, except as regards the securities from which the annuity was to be paid.⁵⁴ But an estate granted in clear terms is not cut down by subsequent words of the will unless they are legally as clear and decisive as those by which the estate was created.⁵⁵ Hence where a section of a will containing a specific devise of land is followed by a section containing a general devise of all the testator's property to other beneficiaries, there being no apparent intention to revoke the first provision, it was held to be unaffected by the second.⁵⁶

Care must be taken to distinguish between the case of genuinely irreconcilable provisions, in which the latter governs, and cases where in the absence of any attempt to change the prior disposition

case where the second devise is not contained in the same instrument. See *Sherrat v. Bentley*, *supra*, and *Bigelow on Wills*, p. 222.

⁵² *Covert v. Sebern*, 73 Iowa, 564, 35 N. W. 636; *Hollins v. Coonan*, 9 Gill (Md.) 62.

⁵³ *Thrasher v. Ingram*, 32 Ala. 645; *Rogers v. Highnote*, 126 Ga. 740, 56 S. E. 93; *Smith v. Curry*, 52 Ill. App. 227; *Evans v. Hudson*, 6 Ind. 293; *Heidlebaugh v. Wagner*, 72 Iowa, 601, 34 N. W. 439; *ARMSTRONG v. CRAPO*, 72 Iowa, 604, 34 N. W. 437, *Dunmore Cas. Wills*, 210; *Orr v. Moses*, 52 Me. 287; *Pratt v. Rice*, 7 Cush. (Mass.) 209; *Homer v. Shelton*, 2 Metc. (Mass.) 202; *Foster v. Stevens*, 146 Mich. 131, 109 N. W. 265; *Rogers' Ex'rs v. Rogers*, 49 N. J. Eq. 98, 23 Atl. 125; 1 Jar. *Wills*, 472.

⁵⁴ *In re Bates*, 159 Mass. 252, 34 N. E. 266.

⁵⁵ *Hochstedler v. Hochstedler*, 108 Ind. 506, 9 N. E. 467; *Settle v. Shafer* (1910) 229 Mo. 561, 129 S. W. 897; *Kimble v. White*, 50 N. J. Eq. 28, 24 Atl. 400; *In re Peters' Estate*, 69 App. Div. 465, 74 N. Y. Supp. 1028; *In re Upham's Estate*, 127 Cal. 90, 59 Pac. 315.

An express limitation cannot be removed by a clause of doubtful meaning. So, a life estate previously devised is not converted into an absolute estate by a later clause the meaning of which is doubtful. *Adams v. Massey*, 184 N. Y. 62, 76 N. E. 916.

⁵⁶ *Price v. Cole's Ex'x*, 83 Va. 343, 2 S. E. 200.

of the property an effort is made to impose limitations or exercise a control inconsistent with the prior disposition, as where a fee is given, followed by an attempt to further determine the devolution of the property.⁵⁷ In these instances the subsequent clause is repugnant and void, not by reason of any exception to the rule as to the prevalence of the latter of two inconsistent clauses, but because the testator is thereby undertaking to do what, by reason of the nature of the interest created by the earlier clause or the policy of the law, he is incapacitated from doing.⁵⁸

Eighth

While matter which has been omitted from his will by the testator cannot be supplied by the courts,⁵⁹ yet, to effectuate a clear intention, as apparent upon the whole will, a will may be read as if words were transposed,⁶⁰ supplied,⁶¹ rejected,⁶² or changed.⁶³ But none

⁵⁷ Killmer v. Wuchner, 74 Iowa, 359, 37 N. W. 778; Judevine's Ex'rs v. Judevine, 61 Vt. 587, 18 Atl. 778, 7 L. R. A. 517; Hall v. Palmer, 87 Va. 354, 12 S. E. 618, 11 L. R. A. 610, 24 Am. St. Rep. 653.

⁵⁸ Thus where a will gave to the testator's five daughters two-thirds of his estate in fee, and a subsequent provision directed that the interest of two of them should be held by the executor "for the sole use and benefit of them during their natural life, and at their death the balance, if any, to their children," the limitation over was held void for repugnancy, the daughters taking a fee simple. Hall v. Palmer, *supra*. See, also, other cases cited in note 57.

So where a testator devises his realty to trustees, and, by a subsequent clause, directs that the vacant land be leased for 99 years, such clause, if mandatory, is repugnant to the absolute estate previously granted, and therefore void. Blackshire v. Trustees, 94 Md. 773, 51 Atl. 1056. So where a will, after devising certain property to the two sons of the testatrix, provides that none of the property shall be sold until 10 years after the testatrix's death, the latter provision is void as repugnant to the prior disposition of the property. Adams v. Berger (Sup.) 18 N. Y. Supp. 33.

⁵⁹ McFarland v. McFarland, 177 Ill. 208, 52 N. E. 281.

⁶⁰ Walker v. Walker, 17 Ala. 396; Buschemeyer v. Klein (1910) 139 Ky. 124, 129 S. W. 551; Covenhoven v. Shuler, 2 Paige (N. Y.) 122, 21 Am. Dec. 73; Merkel's Appeal, 109 Pa. 235; Green v. Hayman, 2 Chanc. Cas. 210; Marshall v. Hopkins, 15 East, 309.

Thus in Doe dem. v. Allcock, 1 B. & Ald. 137, a testator devised all his hereditaments to his sister A. T. and her two daughters, and their heirs and assigns, equally to be divided between them, in common, for and during the life of A. T., and after her death he devised the third part, so devised to his sister for life, to her two daughters in fee. Making necessary transpositions, it was held that the two daughters took a fee simple in two thirds, and a remainder in fee in the other third.

⁶¹ Bacon v. Nichols, 47 Colo. 31, 105 Pac. 1082; Wolfe v. Hatheway, 81 Conn. 181, 70 Atl. 645; Cooper v. Cooper, 7 Houst. (Del.) 488, 31 Atl. 1043; Penn v. Fogler, 77 Ill. App. 365; Thomson v. Thomson, 115 Mo. 56, 21 S. W. 1085, 1128; White v. Crawford, 87 Mo. App. 262; Butterfield v. Hamant, 105 Mass. 338; Furbee v. Furbee, 49 W. Va. 191, 38 S. E. 511; Pickering v. Lang-

⁶² See note 62 on following page.

⁶³ See note 63 on following page.

of these things can be done if the words used in the will are plain and sensible as they stand.⁶⁴ And no words can be supplied, so long as there is any fair ground to question as to the character of the particular words intended to have been used. But the fact that different opinions might be entertained as to which of two words of nearly the same import, was omitted from the will, forms no objection to supplying the omission.⁶⁵

So no word can be rejected and another substituted in its stead without the clearest certainty that such change expresses the intention of the testator,⁶⁶ or rather the true meaning of the will as a whole. But if the change is manifestly required it may be made. Thus the word "fifth" may be substituted for "fourth,"⁶⁷ "all" for "any,"⁶⁸ "without" for "with,"⁶⁹ "excluding" for "includ-

don, 22 Me. 429; Doe v. Micklem, 6 East, 486, 493; Abbott v. Middleton, 21 Beav. 143, 7 H. L. Cas. 68.

Thus where a testator devises his estate to his wife, but directs that she shall hold it only until the youngest of his children, if any are born, shall attain 21 years of age, without directing that it shall then go to the children, or making any disposition of it, the court will supply the omission, and construe the will as a devise to the children on the majority of the youngest, such being clearly the testator's intention. *In re Donges' Estate*, 103 Wis. 497, 79 N. W. 786, 74 Am. St. Rep. 885.

⁶² *Schaefer v. Schaefer*, 141 Ill. 337, 31 N. E. 136; *Grimes' Ex'rs v. Harmon*, 35 Ind. 198, 9 Am. Rep. 690; *Needham v. Ide*, 5 Pick. (Mass.) 510; *Taylor v. Boggs*, 20 Ohio St. 516; *McBride v. Smyth*, 54 Pa. 245; *Finlay v. King*, 3 Pet. 346, 377, 7 L. Ed. 701; *Boon v. Cornforth*, 2 Ves. Sr. 276; *Doe v. Stenlake*, 12 East, 515; *Dent v. Pepys*, 6 Madd. 350.

Thus, where testatrix gave one-fifth of her estate to each of her four children and one-tenth to each of her five grandchildren, the intention of the testatrix being manifest, the court rejected the designation "one-tenth" and construed the will as if it devised four-fifths to the children and one-fifth to the five grandchildren in equal shares. *In re Ehler's Will* (1913) 155 Wis. 46, 143 N. W. 1050.

⁶³ *Dulany v. Middleton*, 72 Md. 67, 19 Atl. 146; *Kahn v. Tierney*, 135 App. Div. 897, 120 N. Y. Supp. 663; *Home for Incurables v. Noble*, 172 U. S. 383, 19 Sup. Ct. 226, 43 L. Ed. 486.

⁶⁴ *Ely v. Ely's Ex'rs*, 20 N. J. Eq. 43; *Bender v. Bender*, 226 Pa. 607, 75 Atl. 859, 134 Am. St. Rep. 1088. *Appeal of Shreiner*, 53 Pa. 106; *Chambers v. Brailsford*, 19 Ves. 654.

⁶⁵ 1 Jar. Wills, 456.

⁶⁶ *Boston Safe Deposit & Trust Co. v. Buffum*, 186 Mass. 242, 71 N. E. 549; *Matteson v. Brown* (1911) 33 R. I. 339, 80 Atl. 133; *Neal v. Hamilton Co.*, 70 W. Va. 250, 73 S. E. 971 (requiring that intention be apparent beyond reasonable doubt).

⁶⁷ *Hart v. Trelk*, 2 De G., M. & G. 300.

⁶⁸ *Thomas' Ex'r v. Thomas' Guardian*, 110 S. W. 853, 33 Ky. Law Rep. 700; *Godwin v. Banks*, 87 Md. 425, 40 Atl. 268.

⁶⁹ *Johnson v. Johnson*, 128 Ind. 93, 27 N. E. 340. Here the testator left three sons and two grandchildren, to the latter of whom he bequeathed his property. The will contained the following clause: "But to be held in trust

ing,"⁷⁰ "oldest" for "youngest,"⁷¹ "minority" for "majority,"⁷² "when" for "if,"⁷³ "payable" for "paid,"⁷⁴ "other" for "survivor,"⁷⁵ "and" for "or,"⁷⁶ "or" for "and,"⁷⁷ "among" for "between."⁷⁸

The ordinary rules of grammar are to be adhered to in the construction of a will, unless a different construction is necessary to effectuate the intention of the testator.⁷⁹

Punctuation and spelling may aid the court in getting at the testator's meaning, but they are not to be regarded if any change in that respect will more clearly bring out the meaning.⁸⁰ So, on the principle sustaining the insertion of words, punctuation may be inserted as an aid to the development of the true meaning,⁸¹ and its omission will not affect the obvious sense of the will.⁸²

Ninth

Where there is any room for construction, that interpretation will be adopted which prefers the blood of the testator to that of strangers.⁸³ Thus where there was uncertainty in a will as to whether a particular devise was intended for a grandson and heir not otherwise mentioned, or for another of the same name not

for said children until they become of lawful age, and, if they die with any children of their own, their said property shall go to my three sons." It was held that, by an obvious clerical error, the clause was made to read, "with any children," etc., instead of "without any children," etc., and that the latter would be regarded as the true reading.

⁷⁰ *In re Huddleston's Goods*, 63 Law T. 255.

⁷¹ *Tayloe v. Johnson*, 63 N. C. 381.

⁷² *State v. Joyce*, 48 Ind. 310.

⁷³ *Smart v. Clark*, 3 Russ. C. C. 365.

⁷⁴ *Martineau v. Rogers*, 8 De G., M. & G. 328.

⁷⁵ *Wilmot v. Wilmot*, 8 Ves. 10.

⁷⁶ *Moore's Adm'r v. Sleet*, 113 Ky. 600, 68 S. W. 642; *Hall v. Blodgett*, 70 N. H. 437, 48 Atl. 1085; *Goldsborough v. Washington* (1911) 112 Va. 104, 70 S. E. 525.

⁷⁷ *Johnson v. Simcock*, 7 H. & N. 344; 1 Wms. Ex'rs, 1163, and cases cited.

⁷⁸ *In re Hicks' Estate*, 134 Pa. 507, 19 Atl. 705. Here the will provided "that my property shall be equally divided between my wife and my daughters Ida and Ella."

⁷⁹ *Twiss v. Simpson*, 183 Mass. 212, 66 N. E. 795.

⁸⁰ *Holt v. Wilson*, 82 Kan. 268, 108 Pac. 87; *Reynolds v. Reynolds* (1903) 65 S. C. 390, 43 S. E. 878; *Arcularius v. Gelsenhainer*, 3 Bradf. Sur. (N. Y.) 64; *Greenough v. Cass*, 64 N. H. 326, 10 Atl. 757; *Kinkele v. Wilson*, 151 N. Y. 269, 45 N. E. 869.

⁸¹ *Lycan v. Miller*, 112 Mo. 548, 20 S. W. 36, 700; *In re Hansen*, 72 Misc. Rep. 610, 132 N. Y. Supp. 257.

⁸² *Black v. Herring*, 79 Md. 146, 28 Atl. 1063.

⁸³ *In re Boyce's Estate*, 37 Misc. Rep. 146, 74 N. Y. Supp. 946; *Central Trust Co. of New York v. Richards*, 35 Misc. Rep. 247, 71 N. Y. Supp. 773; *Downing v. Bain*, 24 Ga. 372; *Miller v. Hirsch*, 110 La. 259, 34 South. 435.

an heir, the presumption was in favor of the heir.⁸⁴ And in order to deprive an heir or distributee of his share, the testator must give his property to some one else. An instrument devoted exclusively to providing that an heir shall take nothing, and not containing affirmative dispositions to others, does not effect the purpose.⁸⁵ In many cases the courts insist that the heir is not to be disinherited except by express words or necessary implication,⁸⁶ although such a rule sometimes conflicts with the presumption against partial intestacy.⁸⁷

Tenth

When a will or any part thereof is open to two interpretations, one of which is illegal or invalid, the valid interpretation will be adopted as expressive of the true testamentary intent.⁸⁸ Thus if one interpretation will suspend the absolute ownership of the property beyond the period made lawful by statute, another possible interpretation under which the devise is valid will be adopted.⁸⁹ And invalid provisions of a will, if separable from the valid portions, will be rejected, and effect given to the valid provisions, where, by so doing, the general purpose of the testator can be effectuated.⁹⁰

⁸⁴ Willard v. Darrah, 168 Mo. 660, 68 S. W. 1023, 90 Am. St. Rep. 468.

⁸⁵ 2 Jar. Wills, 840; Coffman v. Coffman, 85 Va. 459, 8 S. E. 672, 2 L. R. A. 848, 17 Am. St. Rep. 69; Lawrence v. Smith, 163 Ill. 149, 45 N. E. 259; Southgate v. Karp, 154 Mich. 697, 118 N. W. 600; Hellman v. Reitz (1911) 89 Neb. 422, 131 N. W. 909; Wells v. Anderson, 69 N. H. 561, 44 Atl. 103.

So where a testator shows by his will an intention to exclude near relatives in favor of more distant ones, any property undisposed of by the will descends to such near relatives to the exclusion of the more remote. Bill v. Payne, 62 Conn. 140, 25 Atl. 354. See State v. Holmes, 115 Mich. 456, 73 N. W. 548.

⁸⁶ Reed's Estate, 7 Pennewill (Del.) 30, 76 Atl. 617; Wright v. Hicks, 12 Ga. 155, 56 Am. Dec. 451; Howard v. Society, 49 Me. 288; Herter v. Herter, 97 Neb. 260, 149 N. W. 795; Areson v. Areson, 3 Denio (N. Y.), 458; Moore's Estate, 241 Pa. 253, 88 Atl. 432; Smith v. Shriver, 3 Wall. Jr. 219, Fed. Cas. No. 13,108; Coryton v. Helyar, 2 Cox, 340, 348.

⁸⁷ See In re Grothe's Estate, 229 Pa. 186, 78 Atl. 88, where the presumption against intestacy and the presumption against disinheritance are said to be of equal force and effect.

⁸⁸ Fussey v. White, 113 Ill. 637; Rotch v. Emerson, 105 Mass. 431; Dennett v. Dennett, 40 N. H. 498; Coon v. Coon, 38 Misc. Rep. 693, 78 N. Y. Supp. 245; Post v. Hover, 33 N. Y. 593; Butler v. Butler, 3 Barb. Ch. (N. Y.) 304; Succession of Meunier, 52 La. Ann. 79, 26 South. 776, 48 L. R. A. 77; Atkinson v. Hutchinson, 3 P. Wms. 260.

⁸⁹ Hooker v. Hooker, 41 App. Div. 235, 58 N. Y. Supp. 536.

⁹⁰ In re Shillaber's Estate, 74 Cal. 144, 15 Pac. 453, 5 Am. St. Rep. 433; Morris v. Bolles, 65 Conn. 45, 31 Atl. 538; Ketchum v. Corse, 65 Conn. 85, 31 Atl. 486; Nevitt v. Woodburn, 190 Ill. 283, 60 N. E. 500; Lawrence v. Smith, 163 Ill. 149, 45 N. E. 259; Murphey v. Brown, 159 Ind. 106, 62 N. E. 275; Niles v. Mason, 126 Mich. 482, 85 N. W. 1100; Dean v. Mumford, 102 Mich. 510, 61 N. W. 7; McClary v. Stull, 44 Neb. 175, 62 N. W. 501; Lindo v.

Thus a trust for the benefit of a life tenant is not affected by the invalidity of a trust in the same property for the benefit of a remainderman, when the two trusts are separate.⁹¹ So a legacy, made up of principal and income, though void as to the latter, may yet be valid as to the former,⁹² and the invalidity of a provision for the accumulation of profits does not vitiate a provision for the ultimate division of the principal.⁹³ So the invalidity of a trust, intermediate between an otherwise valid life estate and valid remainders over, will not affect the validity of the latter.⁹⁴ And an attempted limitation, void for indefiniteness, upon an otherwise lawful charitable trust, does not invalidate the latter.⁹⁵ But a void clause avoids the whole will where it constitutes an integral part of a general scheme for the disposition of the testator's property, and cannot be separated therefrom without defeating the testator's intention.⁹⁶ Thus where it was evident from the whole will that it was the testator's intention to provide equally for three different classes of his descendants, and annuities to two of the classes failed because coupled with a void clause, the annuity to the other class was not allowed

Murray, 157 N. Y. 697, 51 N. E. 1091; *Duncklee v. Butler*, 38 App. Div. 99, 56 N. Y. Supp. 491; *Haug v. Schumacher*, 28 Misc. Rep. 671, 59 N. Y. Supp. 1056; *Franklin v. Minertzhagen*, 39 App. Div. 555, 57 N. Y. Supp. 401; *Brown v. Brown*, 54 App. Div. 6, 66 N. Y. Supp. 218; *Mansbach v. New*, 58 App. Div. 191, 68 N. Y. Supp. 674; *United States Trust Co. v. Maresi*, 33 Misc. Rep. 539, 68 N. Y. Supp. 618; *Kennedy v. Hoy*, 105 N. Y. 134, 11 N. E. 390; *Becker v. Becker*, 13 App. Div. 342, 43 N. Y. Supp. 17; *Sanford v. Goodell*, 82 Hun, 369, 31 N. Y. Supp. 490; *Adams v. Berger* (Sup.) 18 N. Y. Supp. 33; *Brown v. Richter*, 76 Hun, 469, 27 N. Y. Supp. 1094; *In re Ricard's Estate*, 7 Misc. Rep. 619, 28 N. Y. Supp. 583; *Mullins v. Mullins*, 11 Misc. Rep. 463, 33 N. Y. Supp. 430; *Armstrong v. Douglass*, 89 Tenn. 219, 14 S. W. 604, 10 L. R. A. 85; *Saxton v. Webber*, 83 Wis. 617, 53 N. W. 905, 20 L. R. A. 509; *Beurhaus v. Cole*, 94 Wis. 617, 69 N. W. 986.

⁹¹ *Finch v. Wilkes*, 17 Misc. Rep. 428, 41 N. Y. Supp. 227; *Maitland v. Baldwin*, 70 Hun, 267, 24 N. Y. Supp. 29; *Leake v. Watson*, 60 Conn. 498, 21 Atl. 1075.

⁹² *In re Hoyt's Estate* (Sur.) 11 N. Y. Supp. 902; *Chilcott v. Hart*, 23 Colo. 40, 45 Pac. 391, 35 L. R. A. 41.

⁹³ *In re Roos' Estate*, 4 Misc. Rep. 232, 24 N. Y. Supp. 862; *Siefke v. Siefke*, 34 Misc. Rep. 77, 69 N. Y. Supp. 514; *Hascall v. King*, 162 N. Y. 134, 56 N. E. 515, 76 Am. St. Rep. 302; *Greer v. Chester*, 131 N. Y. 629, 30 N. E. 863.

⁹⁴ *Kalish v. Kalish*, 166 N. Y. 368, 59 N. E. 917.

⁹⁵ *Phillips v. Harrow*, 93 Iowa, 92, 61 N. W. 434.

⁹⁶ *In re Fair's Estate*, 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70; *Fair v. Angus*, 132 Cal. 580, 64 Pac. 1111; *Pitzel v. Schneider*, 216 Ill. 87, 74 N. E. 779; *Eldred v. Meek*, 183 Ill. 26, 55 N. E. 536, 75 Am. St. Rep. 86; *Lawrence v. Smith*, 163 Ill. 149, 45 N. E. 259; *ANDREWS v. LINCOLN*, 95 Me. 541, 50 Atl. 898, 56 L. R. A. 103, *Dunmore Cas. Wills*, 72; *Tweddell v. Trust Co.*, 166 N. Y. 608, 59 N. E. 1131; *Brandt v. Brandt* (Super. N. Y.) 13 Misc. Rep. 431, 34 N. Y. Supp. 684; *In re Gerber's Estate*, 196 Pa. 366, 46 Atl. 497.

to stand, though not invalid by the terms of the instrument, since such holding would defeat the testator's manifest intention.⁹⁷

Eleventh

Although no gift is, in terms, made by a will, yet if the language employed gives rise to a necessary implication that a gift was intended this intention will be effectuated.⁹⁸ The implication must be so plain as to leave no room for doubt; the probability of an intention to make the gift implied must be so strong that an intention contrary to that which is imputed to the testator cannot be supposed to have existed in his mind.⁹⁹ Such an implication exists where the devise is to the testator's heir after the death of a person named. In such a case the inference is irresistible that the testator intends to give a life estate to the person named. No such inference necessarily results where the devise over is to a stranger.¹ So a gift to A., "in case B. dies before the expiration of the lease," gives B. an estate for the term of the lease by implication.² So where a testator unequivocally refers to a disposition as made in his will, which, in fact, he has not made, the intention to make such a disposition is sufficiently indicated.³ But no devise or bequest by implication arises by reason of an erroneous recital in a will that some one has

⁹⁷ *Hafner v. Hafner*, 62 App. Div. 316, 71 N. Y. Supp. 1.

⁹⁸ *Boston Safe-Deposit & Trust Co. v. Coffin*, 152 Mass. 95, 25 N. E. 30, 8 L. R. A. 740; *MASTERSON v. TOWNSHEND*, 123 N. Y. 458, 25 N. E. 928, 10 L. R. A. 816, *Dunmore Cas. Wills*, 212; *Bishop v. McClelland's Ex'rs*, 44 N. J. Eq. 450, 16 Atl. 1, 1 L. R. A. 551; *Connor v. Gardner*, 230 Ill. 258, 82 N. E. 640, 15 L. R. A. (N. S.) 73.

⁹⁹ *Bishop v. McClelland's Ex'rs*, *supra*; *Bond v. Moore*, 236 Ill. 576, 86 N. E. 386, 19 L. R. A. (N. S.) 540; *Ball v. Phelan* (1909) 94 Miss. 293, 49 South. 956, 23 L. R. A. (N. S.) 895; *Coberly v. Earle*, 60 W. Va. 295, 54 S. E. 336.

No such implication arises with regard to the children of the niece, where the testator devised property in trust to pay the rents to his niece during her life, and after her death, she leaving no child, the property to go over. *In re Rawlins' Trust*, 45 Ch. Div. 299.

So a testator, by giving his residuary personalty after the death of his wife to some only of his next of kin, does not give his wife a life interest therein, by implication. *Chamberlain v. Springfield*, 8 Reports, 466, [1894] 3 Ch. 603. For further illustration of insufficient implication, see *Barlow v. Barnard*, 51 N. J. Eq. 620, 28 Atl. 597.

One who has created an invalid trust cannot explain, in a will subsequently executed, that his real meaning was something different from what his words implied, and without any new words of devise effect the creation of a new trust by a new interpretation of the old deed. *Wardens & Vestry of St. Paul's Church v. Attorney General*, 164 Mass. 188, 41 N. E. 231.

¹ *Stevens v. Hale*, 2 Drew. & Sm. 22; *Blake's Trusts*, L. R. 3 Eq. 799.

² *Den ex dem. White v. Holton*, 23 N. J. Law, 330.

³ *Adams v. Adams*, 1 Hare, 540; *Yates v. Thomson*, 3 Cl. & Fin. 572; *Hunt v. Evans*, 134 Ill. 496, 25 N. E. 579, 11 L. R. A. 185.

property rights created by some other instrument.⁴ Accordingly an erroneous recital by testator in his will that he is the holder of a policy on his life in favor of his wife and children, and that they will receive the proceeds of the policy at his death "under and by virtue of said policy," cannot operate as a bequest of such proceeds to them by implication.⁵

Twelfth

An express bequest cannot be controlled by the reason assigned therefor. While such reason may aid in the construction of doubtful words, it cannot warrant the rejection of words that are clear.⁶ Neither can the obvious meaning of the will be controlled by the inconvenient or unmeritorious nature of the bequest.⁷

Incurable Uncertainty

If the provisions of a will, considered as an entirety, in the light of all the surrounding circumstances, and interpreted in accordance with the rules of construction as herein stated,⁸ are so obscure that no definite idea can be formed of the intention of the testator in any of the dispositions which he has undertaken to make, the will must then fail for uncertainty.⁹ But to avoid a will on this ground it is not enough that the dispositions in it are so obscure and irrational that it is difficult to believe they could have been intended by the testator, but it must be incapable of any clear meaning.¹⁰

⁴ Noble v. Tipton, 219 Ill. 182, 76 N. E. 151, 3 L. R. A. (N. S.) 645; Koger v. Koger, 92 S. W. 1167, 29 Ky. Law Rep. 687; Zimmerman v. Hafer, 81 Md. 347, 32 Atl. 316.

⁵ Smith v. Smith (1910) 113 Md. 495, 77 Atl. 975, 31 L. R. A. (N. S.) 922, 140 Am. St. Rep. 435.

⁶ 2 Wms. Ex'rs, 1087; Denson v. Mitchell, 26 Ala. 369; Quincy v. Rogers, 9 Cush. (Mass.) 295; Howland v. Seminary, 5 N. Y. Super. Ct. 83; Geyer v. Wentzel, 68 Pa. 84; Cole v. Wade, 16 Ves. 46.

⁷ 2 Wms. Ex'rs, 1088; Thellusson v. Woodford, 4 Ves. 329; Smith v. Streatfield, 1 Meriv. 358; Defflis v. Goldschmidt, 1 Meriv. 419.

⁸ These rules of construction, when not taken in terms therefrom, are based substantially upon Jarman's Rules of Construction (2 Jar. Wills [Big. Ed.] *1654), which have been generally adopted as sound formulas ever since their enunciation.

⁹ Cope v. Cope, 45 Ohio St. 464, 15 N. E. 206; Kelley v. Kelley, 25 Pa. 460; Wootton v. Redd's Ex'r, 12 Grat. (Va.) 196.

So a clause in a will requiring the executors "to purchase at a price not exceeding \$—— a tract of land at or near the residence of certain persons, for the latter's use during life as a cattle pasture, is void for uncertainty. In re Traylor, 81 Cal. 9, 22 Pac. 297, 15 Am. St. Rep. 17; Drake v. Drake, 8 H. L. C. 172; Asten v. Asten [1894] 3 Ch. 260.

¹⁰ Mason v. Robinson, 2 Sim. & Stu. 295; Wootton v. Redd's Ex'r, 12 Grat. (Va.) 196; Schoppert v. Gillam, 6 Rich. Eq. (S. C.) 83.

The maxim, "Id est certum," etc., applies here as elsewhere. Thus a devise of property to A., subject to the support of C., according to her condition

EXTRINSIC EVIDENCE AS AFFECTING CONSTRUCTION—GENERAL RULE

105. The writing, in which the will must be expressed, contains the only testamentary intention that the law will effectuate. This intention must be found within the four corners of the instrument or nowhere. Hence extrinsic evidence is inadmissible to show an intent not contained in the document itself.

As applied to wills in writing, this proposition is obvious and unquestioned. Hence a mistake in a will cannot be corrected by extrinsic evidence,¹¹ nor a clause or word omitted by the testator or the scrivener supplied;¹² neither can such evidence be received to show a personal intent contrary to that exhibited by the will on the point at issue,¹³ nor that a direction to a legatee to convey property to a certain person was discretionary and not obligatory,¹⁴ nor to show the purpose of the testator in making the will nor his understanding of its legal effect,¹⁵ nor to limit bequests to the children of a man to his children by a certain wife,¹⁶ nor to establish the draughtsman's understanding of the testator's intention,¹⁷ nor to show an unlawful purpose on the part of the testator in making a bequest when such purpose is not disclosed by the will.¹⁸ In gener-

in life, is not void for uncertainty. *Cresap v. Cresap*, 34 W. Va. 310, 12 S. E. 527. See *In re Knoblauch's Will* (Sur.) 31 Misc. Rep. 418, 65 N. Y. Supp. 658.

¹¹ *Lomax v. Lomax*, 218 Ill. 629, 75 N. E. 1076, 6 L. R. A. (N. S.) 942; *Pocock v. Redinger*, 108 Ind. 573, 9 N. E. 473, 58 Am. Rep. 71; *Newburgh v. Newburgh*, 5 Madd. 364; *Miller v. Travers*, 8 Bing. 244; *In re Callaghan's Estate*, 119 Cal. 571, 51 Pac. 860, 39 L. R. A. 689.

So, where testatrix directs that stated amounts be deducted from bequests to her sons, on account of debts due her from them, extrinsic evidence is not admissible to show that testatrix was mistaken and that sons were not so indebted. *Hopper v. Sellers*, 91 Kan. 876, 139 Pac. 365.

¹² *Fitzpatrick v. Fitzpatrick*, 36 Iowa, 674, 14 Am. Rep. 538; *Griscom v. Evens*, 40 N. J. Law, 402, 29 Am. Rep. 251; *Kurtz v. Hibner*, 55 Ill. 514, 8 Am. Rep. 665; *Taylor v. Horst*, 23 Wash. 446, 63 Pac. 231.

¹³ *Schapiro v. Howard* (1910) 113 Md. 360, 78 Atl. 58, 140 Am. St. Rep. 414; *Sibley v. Maxwell*, 203 Mass. 94, 89 N. E. 232; *Mersman v. Mersman*, 136 Mo. 244, 37 S. W. 909.

¹⁴ *Shanley v. Shanley*, 34 App. Div. 172, 54 N. Y. Supp. 652.

¹⁵ *Zabriskie v. Huyler*, 62 N. J. Eq. 697, 51 Atl. 197.

¹⁶ *Gray's Adm'r v. Pash* (Ky.) 66 S. W. 1026.

¹⁷ *Napier v. Little* (1911) 137 Ga. 242, 73 S. E. 3, 38 L. R. A. (N. S.) 91, Ann. Cas. 1913A, 1013; *Wheeler v. Wood*, 104 Mich. 414, 62 N. W. 577.

¹⁸ *Ellis v. Birkhead*, 30 Tex. Civ. App. 529, 71 S. W. 31. For further illustrations of the general principle, see *Appeal of Baker*, 115 Pa. 590, 8 Atl. 630; *Hosea v. Skinner*, 32 Misc. Rep. 653, 67 N. Y. Supp. 527; *Emery v. Haven*,

al, when the language of the will, as applied to the facts and circumstances to which it relates, clearly shows the testator's intention, extrinsic evidence, as bearing upon that intention, is inadmissible,¹⁹ and this because it is legally irrelevant.

EXTRINSIC EVIDENCE ADMISSIBLE, WHEN

106. But when the will is such as to call for construction, the court, with a view to securing a proper construction, puts itself, so far as may be, in the position of the testator, that it may see things from his point of view. To this end, evidence regarding all relevant facts and circumstances surrounding the testator at the time of executing the will is admissible.

The matter is thus put by Sir James Wigram: "For the purpose of determining the object of the testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, the court may inquire into every material fact relating to the person who claims to be interested under the will, to the property claimed as the subject of disposition, and to the circumstances of the testator, and of his family and affairs, for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will. The same (it is conceived) is true of every other disputed point respecting which it can be shown that a knowledge of extrinsic facts can, in any way, be made ancillary to the right interpretation of a testator's words."²⁰ The modern authorities abundantly support this proposition.²¹ Thus the insolvency of a beneficiary

67 N. H. 503, 35 Atl. 940; *Miller v. Miller*, 22 Misc. Rep. 582, 49 N. Y. Supp. 407.

¹⁹ *Thompson v. Betts*, 74 Conn. 576, 51 Atl. 564, 92 Am. St. Rep. 235; *Jackson v. Alsop*, 67 Conn. 249, 34 Atl. 1106; *Brown v. Tuschoff*, 235 Mo. 449, 138 S. W. 497; *Charch v. Charch*, 57 Ohio St. 561, 49 N. E. 408; *Reynolds v. Reynolds* (1903) 65 S. E. 390, 43 S. E. 878; *Hennegar v. Deadrick* (Tenn. Ch. App.) 54 S. W. 138.

²⁰ Wigram on Wills, 142; proposition 5, cited 1 Redf. Wills, 503, note.

²¹ *In re Langdon's Estate*, 129 Cal. 451, 62 Pac. 73; *White v. Holland*, 92 Ga. 216, 18 S. E. 17, 44 Am. St. Rep. 87; *Hawhe v. Railroad Co.*, 165 Ill. 561, 46 N. E. 240; *Dearlove v. Otis*, 99 Ill. App. 99; *Whiteman v. Whiteman*, 152 Ind. 263, 53 N. E. 225; *Hubbard's Estate v. Hubbard*, 99 Ill. App. 555; *Smith v. Holden*, 58 Kan. 535, 50 Pac. 447; *Ernst v. Foster*, 58 Kan. 438, 49 Pac. 527; *Donohue v. Donohue*, 54 Kan. 136, 37 Pac. 998; *Polsey v. Newton*, 199 Mass. 450, 85 N. E. 574, 15 Ann. Cas. 139; *Van Gallow v. Brandt*, 168 Mich. 642, 134 N. W. 1018; *Webb v. Hayden*, 166 Mo. 39, 65 S. W. 760; *Little v. Giles*, 25 Neb. 313, 41 N. W. 186; *GERMAN PIONEER VEREIN v. MEYER*, 70 N. J. Eq. 192, 63 Atl. 835, *Dunmore Cas. Wills*, 215; *Morris v. Sickly*, 133 N. Y. 456, 31

may be shown as bearing on the intent of the testatrix in creating a trust in his behalf,²² or the feelings of the testator towards a child against whom the will discriminates,²³ or the quantity of the testator's estate on the issue as to whether the devisees took in fee or with limitation over,²⁴ or, on the same issue, that the income of the property was insufficient to support the devisees and that the testator was anxious to provide generously for them,²⁵ or that the land described in the will was all the real estate possessed by the testator, when that fact sheds light on the testamentary intent,²⁶ or that will was drawn by a layman, when there is a doubt as to estate created.²⁷ Further illustrations of the application of the principle occur throughout the remainder of the chapter. Circumstances existing subsequent to the date of execution are obviously inadmissible,²⁸ and there is no occasion to invoke the principle where the language of the will is free from doubt,²⁹ for there is then no room for construction. And evidence regarding irrelevant matters is inadmissible to affect construction, such as the testator's health at the time of executing the will or his length of life afterwards,³⁰ or a deed executed some years prior to the will and having no connection therewith, offered to explain the terms of the will,³¹ or the fact that the testator had no personal property from which legacies could be paid, to aid the claim that the will should be so construed as to charge the legacies as liens on the realty,³² or unfriendly relations between the testator and his daughter, to support a construction alleged to show her disinheritance, when it appears from the will that she was to take her proportionate share in the estate.³³

N. E. 332; *In re Gilmor's Estate*, 154 Pa. 523, 26 Atl. 614, 35 Am. St. Rep. 855; *Cooper v. Pearce* (Tenn. Ch. App.) 62 S. W. 223; *Lenz v. Sens*, 27 Tex. Civ. App. 442, 66 S. W. 110; *In re Cheadle*, 69 Law J. Ch. 753 [1900] 2 Ch. 620, 83 Law T. (N. S.) 297; *Wigmore on Ev.* § 2470.

²² *Herring v. Patten*, 18 Tex. Civ. App. 147, 44 S. W. 50.

²³ *Hurst v. Von de Veld*, 158 Mo. 239, 58 S. W. 1056.

²⁴ *Hennegar v. Deadrick* (Tenn. Ch. App.) 54 S. W. 138.

²⁵ *Id.*

²⁶ *Lomax v. Shinn*, 162 Ill. 124, 44 N. E. 495.

²⁷ *Overheiser v. Lackey*, 207 N. Y. 229, 100 N. E. 738, Ann. Cas. 1914C, 229.

²⁸ *Morris v. Sickly*, 133 N. Y. 456, 31 N. E. 332.

²⁹ *Cochran v. Hudson*, 110 Ga. 762, 36 S. E. 71; *Dearlove v. Otis*, 99 Ill. App. 99; *In re Wells*, 113 N. Y. 396, 21 N. E. 137, 10 Am. St. Rep. 457.

³⁰ *Barber v. Pittsburgh, Ft. W. & C. R. Co.*, 166 U. S. 83, 17 Sup. Ct. 488, 41 L. Ed. 925.

³¹ *Chamblee v. Broughton*, 120 N. C. 170, 27 S. E. 111.

³² *Wentworth v. Read*, 166 Ill. 139, 46 N. E. 777; *McGough v. Hughes*, 18 R. I. 768, 30 Atl. 851.

³³ *McQueen v. Lilly*, 131 Mo. 9, 31 S. W. 1043. And see *Stratton's Estate*, 112 Cal. 513, 44 Pac. 1028. For further illustrations of irrelevant evidence, see *Brennan v. Winkler*, 37 S. C. 457, 16 S. E. 190; *Crabtree v. Dwyer*, 257

EQUIVOCATIONS—EXTRINSIC EVIDENCE OF INTENTION

107. Where the object of the testator's bounty, or the subject-matter upon which the will purports to operate, is described in terms which are applicable indifferently to more than one person or thing, extrinsic evidence, including declarations of the testator, is admissible to show his intention, in so far as it connects itself with and is explanatory of the language of the will.

While there is undoubtedly some actual conflict in the decisions, it is believed that this is a correct statement of the true and generally recognized rule on this subject.⁸⁴ The term "equivocation" is used in preference to the expression "latent ambiguity." The use of the latter term is avoided by reason of its misleading association with the term "patent ambiguity," which it does not resemble, and with which it has no natural connection.⁸⁵ A patent ambiguity is steadily said to be one which is manifest upon the face of the instrument. But such cases are generally those in which, from an inspection of the document, it is clear that the intent of the maker has been imperfectly expressed, as by failing to insert the name of a legatee, or the amount of the bequest, or by the use of language which is unintelligible. In such instances no parol evidence can be received to supplement the will, not because any principle of the law of evidence is opposed thereto, but because statutes ordinarily require that the will which is to take effect must be a will in writing.⁸⁶ A latent ambiguity is said to be one not apparent on the face of the will, but arising from the proof of facts outside the will, showing that the words of the instrument, though apparently definite and specific, are yet susceptible of an application, with equal propriety, to two or more different subjects or objects.⁸⁷ Yet, so far as the admissibility of extrinsic evidence is concerned, words whose equivocal character is disclosed by the will itself stand on precisely the same footing as words whose equivocal character is manifested only by extrinsic facts. Thus a will containing a legacy to "George Gord, the son of John Gord," and to "George Gord, the son of

Ill. 101, 100 N. E. 510; *Foster v. Clifford*, 87 Ohio St. 294, 101 N. E. 269, Ann. Cas. 1915B, 65.

⁸⁴ See Wigmore on Ev. § 2472, and cases there cited.

⁸⁵ Thayer, Prelim. Treat. on Ev. 424.

⁸⁶ *Doe dem. Gord v. Needs*, 2 M. & W. 129. See *Smith v. Smith* (Ky. 1903) 72 S. W. 766.

⁸⁷ 1 Redf. Wills. 574.

George Gord," also contained a devise to "George Gord, the son of Gord." The lessor of the plaintiff, who was George Gord, the son of George Gord, brought an action of ejectment to recover the premises devised, and offered to prove declarations of the testator showing him to be the devisee intended by the testator, which were admitted.³⁸ In fact, so far as any question of genuine ambiguity in meaning is concerned, there is no distinction in the rules of evidence applicable to latent and patent ambiguities.³⁹ Indeed, it were well if the use of the terms were abandoned. An ambiguity is better termed an equivocation. A "patent ambiguity" is ordinarily an obvious imperfection in the expression of the testator's intent, and might be well enough so described.

In the case of an equivocation, then, any relevant extrinsic evidence is admissible to disclose the testator's intent as contained in the equivocal words,⁴⁰ including evidence of the testator's declarations,⁴¹ as where a devise was to John Cluer, of Calcot, and

³⁸ Doe dem. Gord v. Needs, 2 M. & W. 129. The court say: "There would have been no doubt whatever of the admissibility of the evidence of the devisor's intention if the devise to 'George, the son of Gord,' had stood alone, and no mention had been made in the will of George, the son of John Gord, and George, the son of George Gord. But does the circumstance that there are two persons named in the will, each answering the description of 'George, the son of Gord,' prevent the application of this rule? We are of the opinion that it does not. In truth, the mention of persons by those descriptions in other parts of the will has no more effect for this purpose than proof by extrinsic evidence of the existence of such persons, and that they were known to the devisor, would have had."

³⁹ Meyers v. Maverick (Tex. Civ. App.) 28 S. W. 716. And see Wigram, Ev. 80, 203; 1 Jar. Wills, 745. See, also, article by Professor Graves in Am. Law Review (May, 1894).

⁴⁰ Thomas v. Scott (Ky. 1903) 72 S. W. 1129; Van Nostrand v. Board, 59 N. J. Eq. 19, 44 Atl. 472 (where a bequest was made to the "Domestic Missionary Society," and there were a number of societies to which the term might apply). Accord: Gilmer v. Stone, 120 U. S. 586, 7 Sup. Ct. 689, 30 L. Ed. 734; Hartwig v. Schlefer, 147 Ind. 64, 46 N. E. 75 (to identify "my life insurance policy amounting to \$1,000"); Schlottman v. Hoffman, 73 Miss. 188, 18 South. 893, 55 Am. St. Rep. 527 (where the amount of a bequest was expressed by the dollar sign, followed by the figure "5," and this by two ciphers connected, removed by a distinct space from the "5," though not separated from it by a decimal mark, and written somewhat above the line); Skinner v. Harrison Tp., 116 Ind. 139, 18 N. E. 529, 2 L. R. A. 137 (where the devise was to Harrison township, and there were several townships of that name).

See, also, Fritsche v. Fritsche, 75 Conn. 285, 53 Atl. 585; Armstrong v. Galusha, 43 App. Div. 248, 60 N. Y. Supp. 1; In re Miner, 72 Hun, 568, 25 N. Y. Supp. 537; In re Grainger, 69 Law J. Ch. 789 [1900] 2 Ch. 756, 83 Law T. 209; Doe dem. Thomas v. Beynon, 12 A. & E. 431.

⁴¹ Vandiver v. Vandiver, 115 Ala. 328, 22 South. 154; In re Wheeler's Will, 161 N. Y. 652, 57 N. E. 1128; Id., 32 App. Div. 183, 52 N. Y. Supp. 943; Klock

there were two persons, father and son, of that name,⁴² or to "my nephew Joseph Grant," under which a nephew of the testator and a nephew of the testator's wife, each having the same name, claimed.⁴³ It is apparently immaterial at what time these declarations were made.⁴⁴ By the weight of authority such declarations may be proved to aid construction only in the case of an equivocation.⁴⁵ The reason for the exclusion of testator's declarations of intention, except where there is an equivocation, although such declarations would frequently throw much light on the problem of interpretation, is to be found in "the rule which prohibits setting up any extrinsic utterance to compete with and overthrow the words of a document which solely embodies the transaction."⁴⁶

Some cases support the rule that, where the description in a will applies exactly to only one person, there is no ambiguity, and that parol evidence cannot be received to show that the testator intended, by the description used, to designate another beneficiary, whom he knew under the description employed. In other words, the equivocation must exist objectively, and not with reference to the state of the testator's mind, subjectively considered. So, if a will gives a legacy to John Smith, Henry Jones cannot take, although you show that the testator always called Henry Jones by the name of John Smith, and that he never actually knew a John Smith at all.⁴⁷ Although testator's declarations of intention are not ad-

v. Stevens (Sup.) 20 Misc. Rep. 383, 45 N. Y. Supp. 603; *In re Hubbuck's Estate* (1905) Prob. 129; Wigmore on Ev. § 2472.

⁴² *Jones v. Newman*, 1 W. Bl. 60.

⁴³ *Grant v. Grant*, L. R. 5 C. P. 728 (there were other facts in this case which rendered the testator's intent pretty clear, aside from the evidence of his declarations). Contra: *In re Root's Estate*, 187 Pa. 118, 40 Atl. 818, on the ground that there was no genuine ambiguity.

So where a testator gave a legacy to his farming man, W. R., and he had two employes of that name, declarations in favor of one of them were admitted. *Reynolds v. Whelan*, 16 Law J. Ch. 434.

⁴⁴ *Doe dem. Allen v. Allen*, 12 A. & E. 451; *Langham v. Sandford*, 19 Ves. 649. See 1 Jar. Wills, 408.

The dictum that such declarations can only be received if made contemporaneously with the execution of the will, in *Thomas v. Thomas*, 6 T. R. 671, 678, is apparently overruled.

⁴⁵ *DOE DEM. HISCOCKS v. HISCOCKS*, 5 M. & W. 363, *Dunmore Cas. Wills*, 220; *Charter v. Charter*, L. R. 7 H. L. 364; *Alexander v. Bates*, 127 Ala. 328, 28 South. 415; *In re Denfield*, 156 Mass. 265, 30 N. E. 1018; *Hogle v. Hogle*, 49 Hun, 313, 2 N. Y. Supp. 172; *Patterson v. Wilson*, 101 N. C. 594, 8 S. E. 341; *Perea v. Barela*, 5 N. M. 458, 23 Pac. 766.

See *Tomkins v. Merriam*, 155 Pa. 440, 26 Atl. 659; *Crosson v. Dwyer*, 9 Tex. Civ. App. 482, 30 S. W. 929.

⁴⁶ Wigmore on Ev. § 2471.

⁴⁷ The leading case which goes to this length is *Tucker v. Aid Soc.*, 7 Metc.

missible in cases like the one last suggested,⁴⁸ there is no sufficient reason why other extrinsic evidence should not be admitted to show what testator meant by the words which he used.⁴⁹

IMPERFECT DESCRIPTION—EXTRINSIC EVIDENCE

108. When the language of the will applies but partially or imperfectly to any subject-matter or object of the testator's bounty, or partially to two or more subjects or objects, evidence may be received to show any relevant facts as shedding light upon the testator's intention, such as the condition of the testator's estate or family, and the circumstances by which he was surrounded at the time of executing the will.

Where a description of the above character occurs, it is sometimes described as giving rise to a latent ambiguity,⁵⁰ and evidence is admitted to explain it in much the same way as in the case of genuine equivocations. But there is no true ambiguity in such instances, and, as has been pointed out,⁵¹ the use of this term may be wisely avoided. Any material facts relating to the person who claims under a will are admissible to identify the person

(Mass.) 188, although it is not wholly clear that precisely this point was involved. The will contained legacies "to the Seaman's Aid Society of the City of Boston." The testator intended the bequest for a society in New York, called "The Seamen's Friend Society," but the scrivener inserted the other name; both he and the testator at the time supposing that to be the name of the society intended by the testator. The mistake occurred in consequence of incorrect information given the testator by the scrivener, through his imperfect knowledge of the subject. It was held that the will, as written, must prevail, and that the Boston Society would take, although in fact, the testator knew nothing about the latter society. While, in view of all the facts, this decision may be correct, the case is of doubtful value as enunciating a principle of construction. See Thayer, Prelim. Treat. Ev. pp. 468, 477, note.

⁴⁸ *Dunham v. Averill*, 45 Conn. 61, 29 Am. Rep. 642.

⁴⁹ Wigmore on Ev. §§ 2462, 2463. The case of *Powell v. Biddle*, 2 Dall. (Pa.) 70, 1 L. Ed. 293, 1 Am. Dec. 263, is correct, on principle. That was the case of a devise "to Samuel Powell (son of Samuel Powell, of Philadelphia, carpenter)." It appeared that Samuel Powell had a son named Samuel Powell by a second marriage, with whom the testator had no acquaintance. He also had a son named William Powell by the testator's deceased daughter. This son was well known to the testator, who was in the habit of calling him Samuel. Evidence of these facts was admitted, and it was adjudged that William should take the legacy.

⁵⁰ *Vandiver v. Vandiver*, 115 Ala. 328, 22 South. 154. See *Decker v. Decker*, 121 Ill. 341, 12 N. E. 750; *Covert v. Sebern*, 73 Iowa, 564, 35 N. W. 636; *Gordon v. Burris*, 141 Mo. 602, 43 S. W. 642.

⁵¹ Ante, p. 343.

intended,⁵² when there is conflict among the claimants, as where there was a devise in trust to the "Moravian Church of S.," and there was a denomination known as "the Moravian Church," though having a somewhat different official designation, incorporated and having title to all the churches and schools within its jurisdiction, and also a Moravian Church at S.,⁵³ or where there was a devise "to my nephews, J. and W.," and the testator left two grandsons, J. and W., and a nephew, J., and two grandnephews, J. and W.⁵⁴ In general, when a bequest is made to a church or society by a wrong or inaccurate name, it may be shown by extrinsic evidence what society was intended.⁵⁵ In such cases, when the description corresponds in part to that of any existing corporation, evidence of the relation of the testator to such corporation is admissible as bearing upon his intention to make it a beneficiary,⁵⁶ and of his knowledge of one of the claimants and his ignorance of the others,⁵⁷ and of the fact that one of the claimants had a church building in the testator's neighborhood, while the other did not.⁵⁸

⁵² *Missionary Soc. of M. E. Church v. Cadwell*, 69 Ill. App. 280; *Wilson v. Stevens*, 59 Kan. 771, 51 Pac. 903; *In re Gaston's Estate*, 188 Pa. 374, 41 Atl. 529, 68 Am. St. Rep. 874.

So where a will contained a bequest "to such of the daughters of my late friend Ignatius Scoles, deceased, as shall be living and unmarried at my decease," and Ignatius Scoles was a Jesuit priest, unmarried and living at the death of the testator, but his father, who was a friend of the testator, had a number of daughters, to whom, under accurate descriptions, the testator had made bequests in previous wills, it was held that the daughters of the father would take. *In re Waller*, 80 Law T. 701. See, also, *In re Wolverton's Estates*, 7 Ch. D. 197; *Second United Presbyterian Church v. First United Presbyterian Church*, 71 Neb. 563, 99 N. W. 252.

⁵³ *Keith v. Scales*, 124 N. C. 497, 32 S. E. 809.

⁵⁴ *Willard v. Darrah*, 168 Mo. 660, 68 S. W. 1023, 90 Am. St. Rep. 468 (holding that evidence might be received showing that the devise was meant for the grandsons, and that the word "nephews" was inserted by mistake).

So, where testator designated a named devisee as his "half-brother," extrinsic evidence was admitted to show that he had no half-brother, but that he had a brother-in-law of the same name as the designated devisee. *Rathjens v. Merrill*, 38 Wash. 442, 80 Pac. 754.

⁵⁵ *Wilson v. Stevens*, 59 Kan. 771, 51 Pac. 903; *Reformed Presbyterian Church of North America v. McMillan*, 31 Wash. 643, 72 Pac. 502.

Thus a bequest to the "M. E. Church School situated in B.," there being no school by that name, may be shown to have been intended for a school in B. of a different name, controlled by the Methodist Church. *Ross' Ex'r v. Kiger*, 42 W. Va. 402, 26 S. E. 193.

⁵⁶ *In re Amberson's Estate* (1903) 204 Pa. 397, 54 Atl. 484; *Bristol v. Ontario Orphan Asylum*, 60 Conn. 472, 22 Atl. 848; *Faulkner v. Sailors' Home*, 155 Mass. 458, 29 N. E. 645.

⁵⁷ *Field v. Van Wyck's Ex'r*, 94 Va. 557, 27 S. E. 446, 64 Am. St. Rep. 745.

⁵⁸ *Tilley v. Ellis*, 119 N. C. 233, 26 S. E. 29.

The principle as stated in the black-letter text applies to descriptions of the subject-matter of the will. Extrinsic evidence is admissible to show that a particular tract constituted a component part of the land intended to be embraced in a devise of "all one's estate," or of a certain "plantation" in a county,⁵⁹ or to identify lands referred to in the will as "speculation" lands,⁶⁰ or devised as "all that tract of land a part of which is known as the 'R. Place,'"⁶¹ or devised as "upland" when it appeared that the testator had strictly no "uplands," but that his land was "bottom" or "second bottom" or "bench" land.⁶² So a debt referred to in a will as "N.'s debt" may be shown to have always been so referred to by the testatrix, though in fact it was the debt of another for whom N. acted as agent.⁶³ So when, in view of all the facts and circumstances, a part of the description is wrong or inaccurate, the maxim, "*Falsa demonstratio non nocet*," applies, the erroneous portions of the description will be rejected, and, if enough remains to identify the property, the devise or bequest will take effect.⁶⁴ Thus, where a devise was made of lot No. 6 in square 403, and the testator did not own that lot, but did own lot No. 3 in square 406, and it was the evident intention of the testator to dispose of all his property, it was held that the misdescription might be rejected, and that enough would still remain to identify the property.⁶⁵ So when property is described in the will as a certain part of a certain section, township, and range, and the description is inaccurate in any particular, evidence is admissible to show the property owned by the testator, and the will will operate on such portions of the property as are, in view of all the facts, sufficiently identified by the inaccurate description.⁶⁶

⁵⁹ *Flannery v. Hightower*, 97 Ga. 592, 25 S. E. 371; *Thomson v. Thomson*, 115 Mo. 56, 21 S. W. 1085, 1128; *Horton v. Lee*, 99 N. C. 227, 5 S. E. 404.

⁶⁰ *Brown v. Brown*, 106 N. C. 451, 11 S. E. 647.

⁶¹ *Jones v. Quattlebaum*, 31 S. C. 606, 9 S. E. 982.

⁶² *Vandiver v. Vandiver*, 115 Ala. 328, 22 South. 154.

⁶³ *Scott v. Neeves*, 77 Wis. 305, 45 N. W. 421.

⁶⁴ See *Wigmore on Ev.* § 2477 (b) where cases illustrating this principle are collected.

⁶⁵ *Patch v. White*, 117 U. S. 210, 6 Sup. Ct. 617, 710, 29 L. Ed. 860. Accord: *Seebrook v. Fedawa*, 33 Neb. 413, 50 N. W. 270, 29 Am. St. Rep. 488. For general rule, see *Christy v. Badger*, 72 Iowa, 581, 34 N. W. 427.

So where a devise described the premises as "204 Lexington avenue," and the only premises owned on this avenue at or after the time the will was made were numbered 738, he never having owned number 204, it was held to be testator's manifest intent to devise the premises numbered 738. *Govin v. Metz*, 79 Hun, 461, 29 N. Y. Supp. 988. See, also, *Whitcomb v. Rodman*, 156 Ill. 116, 40 N. E. 553, 28 L. R. A. 149, 47 Am. St. Rep. 181; *Hawkins v. Young*, 52 N. J. Eq. 508, 28 Atl. 511.

⁶⁶ *Rogers v. Rogers*, 78 Ga. 688, 3 S. E. 451; *Stewart v. Stewart*, 96 Iowa, 620, 65 N. W. 976; *Eckford v. Eckford*, 91 Iowa, 54, 58 N. W. 1093, 26 L. R.

Declarations of Testator

While it is usually said that declarations of the testator are admissible to show intent only in case of a genuine equivocation, i. e., where the language of the will applies with legal certainty to two or more persons or things,⁶⁷ yet some authorities seem to show that such declarations are competent for that purpose in cases of inaccurate description, regardless of whether the description as used is applicable to one or more objects or beneficiaries, and this seems sound on principle, for such evidence is resorted to, not to effectuate a testamentary intent, independent of the language of the will, but to give effect to that intent to the extent that it has been adequately set forth in the will. Thus, where no one answers to the description of a legatee in a will, former wills made by the testator are admissible to show his knowledge and state of mind at the time, as a means of aiding the court to find out whom he intended to benefit.⁶⁸ So when a will contained bequests to the testatrix's "stepson, H. S. Covert," and it appeared that she had no stepson of that name, and no such person was known to exist, parol evidence was received to show that the testatrix directed the scrivener to bequeath the property to her "stepson, Harvey," and that the scrivener, believing Harvey's initials to be H. S. instead of J. H., wrote those initials to designate him.⁶⁹

A similar difficulty arises in connection with the admissibility of declarations of intention, where there is a misdescription and testator uses words which apply to two persons, each of whom fulfills but one part of the description. For example, suppose testator devises land to A., eldest son of B., and it appears that C. is in fact the eldest son of B., while A. is a younger son. Although testator's declarations of intention have usually been excluded in cases like the one suggested,⁷⁰ on principle, the exception for equivocations should be extended to render such evidence admissible.⁷¹

A. 370; *Thomson v. Thomson*, 115 Mo. 56, 21 S. W. 1085, 1128; *Cornell v. Green* (C. C.) 88 Fed. 821. Compare: *Kurtz v. Hibner*, 55 Ill. 514, 8 Am. Rep. 665; *Sturgis v. Work*, 122 Ind. 134, 22 N. E. 996, 17 Am. St. Rep. 349; *Huffman v. Young*, 170 Ill. 290, 49 N. E. 570; *Decker v. Decker*, 121 Ill. 341, 12 N. E. 750; *Pocock v. Redinger*, 108 Ind. 573, 9 N. E. 473, 58 Am. Rep. 71.

⁶⁷ Ante, p. 342.

⁶⁸ *In re Waller*, 68 Law J. Ch. 526, 80 Law T. (N. S.) 701.

⁶⁹ *Covert v. Sebern*, 73 Iowa, 564, 35 N. W. 636. For further cases illustrating the same view, see *Gordon v. Burris*, 141 Mo. 602, 43 S. W. 642; *Dennis v. Holsapple*, 148 Ind. 297, 47 N. E. 631, 46 L. R. A. 168, 62 Am. St. Rep. 526; *Smith v. Kimball*, 62 N. H. 606. See, also, *Daugherty v. Rogers*, 119 Ind. 254, 20 N. E. 779, 3 L. R. A. 847.

⁷⁰ *DOE DEM. HISCOCKS v. HISCOCKS*, 5 M. & W. 363, *Dunmore Cas. Wills*, 220; *Charter v. Charter*, L. R. 7 H. L. 364; *Drake v. Drake*, 8 H. L. C. 172.

⁷¹ *Miller v. Travers*, 8 Bing. 244; *Wigmore on Ev.* § 2474.

EXTRINSIC EVIDENCE INADMISSIBLE, WHEN

109. No extrinsic evidence is admissible to disclose an intent of the testator as a fact, independent of the language of the will; it must be received as explanatory thereof, or not at all.

This principle, though sometimes lost sight of, is yet an obvious one,⁷² contains a genuine rule of evidence,⁷³ and is abundantly illustrated by the authorities.⁷⁴ Where the provisions of the will are not ambiguous, parol testimony as to the understanding or intention of the testator, or as to the meaning in which the words were used by the person who drew the will, is inadmissible.⁷⁵ So, where the testator devised property to the "Skin and Cancer Hospital," and in the city where he lived there were two institutions, named respectively "New York Skin and Cancer Hospital" and "New York Cancer Hospital," both doing work of the same character, with neither of which was the testator connected, it was held that the will described the former institution with sufficient accuracy, and that parol evidence was not admissible to show that he meant the latter.⁷⁶ And where a will contained a bequest to "My niece, Elizabeth Stringer," it was held that a grandniece of that name must take, though the evidence offered, if received, would have made it abundantly clear that another person, deceased at the time of the execution of the will in question, was the beneficiary intended by the testator in prior wills, and that the bequest to her had been retained in the will in question owing to an oversight.⁷⁷ So where a bequest was given "unto the children of my late cousin" extrinsic evidence is inadmissible to show that the four children

⁷² See Thayer's Cases on Evidence (2d Ed.) 917, note 2.

⁷³ Id. p. 1020.

⁷⁴ Bishop v. Howarth, 59 Conn. 455, 22 Atl. 432; McAleer v. Schneider, 2 App. D. C. 461; Kaiser v. Brandenburg, 16 App. D. C. 310; Vestal v. Garrett, 197 Ill. 398, 64 N. E. 345; Foster v. Smith, 156 Mass. 379, 31 N. E. 291; Defreese v. Lake, 109 Mich. 415, 67 N. W. 505, 32 L. R. A. 744, 63 Am. St. Rep. 584; Forbes v. Darling, 94 Mich. 621, 54 N. W. 385; Shapleigh v. Shapleigh, 69 N. H. 577, 44 Atl. 107; Bradhurst v. Field, 135 N. Y. 564, 32 N. E. 113; Union Trust Co. of New York v. St. Luke's Hospital, 74 App. Div. 330, 77 N. Y. Supp. 528; Thompson v. Kaufman, 9 Pa. Super. Ct. 305; Peet v. Railway Co., 70 Tex. 522, 8 S. W. 203.

⁷⁵ Defreese v. Lake, 109 Mich. 415, 67 N. W. 505, 32 L. R. A. 744, 63 Am. St. Rep. 584.

⁷⁶ Union Trust Co. of New York v. St. Luke's Hospital, 74 App. Div. 330, 77 N. Y. Supp. 528.

⁷⁷ Stringer v. Gardiner, 4 De G. & J. 468.

by a second husband were meant, and not all the children of the cousin referred to.⁷⁸ And where a devise was "to Matthew Westlake, my brother, and to Simon Westlake, my brother's son," parol evidence of the testator's declarations to show that he meant by Simon Westlake a son of his brother Richard, and not Simon Westlake, a son of his brother Matthew, was excluded, the testator's intent being regarded as clearly expressed in the will.⁷⁹

Miscellaneous

Where the will is written in characters not easy to decipher, or in a language which the court does not understand, the evidence of persons skilled in deciphering or translating is admissible for the purpose of determining the meaning of the testator.⁸⁰ And where unusual symbols are used by the testator evidence may be received to ascertain the meaning intended thereby to be conveyed.⁸¹ So persons designated by their nicknames, or by their popular names, or by some familiar term of endearment, may also be identified.⁸²

⁷⁸ *Hampshire v. Peirce*, 2 Ves. 216.

⁷⁹ *Doe dem. Westlake v. Westlake*, 4 B. & Ald. 57. See *DOE DEM. MORGAN v. MORGAN*, 1 Cr. & M. 235; *Dunmore Cas. Wills*, 218.

⁸⁰ 1 Jar. Wills, 421.

⁸¹ *Kell v. Charmer*, 23 Beav. 192. Here, in making his will, a jeweler used, to indicate the amounts of the bequests, the private marks employed by him to designate the prices of goods, and parol evidence was admitted to show that "l. x. x." and "o. x. x." meant £100 and £200, respectively.

⁸² *Inhabitants of First Parish in Sutton v. Cole*, 3 Pick. (Mass.) 232; *Beatty v. Universalist Soc.*, 39 N. J. Eq. 452; *Lee v. Pain*, 4 Hare, 251.

CHAPTER XIV

CONSTRUCTION (Continued)—DESCRIPTION OF SUBJECT-MATTER

- 110. General Rule—Words Operative to Pass the Entire Estate.
- 111. Words Operative upon Real Property—General Rule.
- 112. Words Operative to Pass Personal Property.
- 113-114. The Residuary Clause as an Instrument of Description.

GENERAL RULE—WORDS OPERATIVE TO PASS THE ENTIRE ESTATE

110. The general principles heretofore discussed are applied to the construction of the description of the subject-matter of the will. In view of the presumption against intestacy, any words which can be reasonably interpreted so as to pass the entire property of the testator will be given this effect.

The term "estate," unless restricted in meaning by the context, will include all the property of the testator.¹ Thus a devise to a wife of "one-half of all my estate," though followed by a specific bequest of \$3,000 for immediate support, was held to pass one-half of the entire estate to the wife.²

But where the devise is "of all the estate, consisting of the residue of money, plate, jewels, leases, judgments, mortgages," etc., the particulars enumerated restrict the meaning of the term to personal estate.³ So, if the testator uses, in connection with the word, the terms "bequest," "bequeath," "legacy," and other words descriptive

¹ WARNER v. WILLARD, 54 Conn. 470, 9 Atl. 136, Dunmore Cas. Wills, 224; Chapman v. Chick, 81 Me. 109, 16 Atl. 407; Shumate v. Bailey, 110 Mo. 411, 20 S. W. 178; Boston Safe-Deposit & Trust Co. v. Mixter, 146 Mass. 100, 15 N. E. 141; Hunt v. Hunt, 4 Gray (Mass.) 190; Jackson v. Housel, 17 Johns. (N. Y.) 281; Powell v. Wood, 149 N. C. 235, 62 S. E. 1071; Harper v. Harper, 148 N. C. 453, 62 S. E. 553; Rossetter v. Simmons, 6 Serg. & R. (Pa.) 456; Smith's Ex'r v. Smith, 17 Grat. (Va.) 276; Haley v. Gatewood, 74 Tex. 281, 12 S. W. 25; Barnes v. Patch, 8 Ves. 604; Mayor of Hamilton v. Hodsdon, 6 Moo. P. C. C. 76.

A devise of "all my estate, both real and personal, that I shall inherit as my portion after my father's death," is sufficiently general to pass all the property of the testatrix, and there is no intestacy as to any part thereof. Graham v. Knowles (Pa.) 21 Atl. 985.

² Estate of Stewart, 74 Cal. 98, 15 Pac. 445.

³ Timewell v. Perkins, 2 Atk. 102. See Bullard v. Goffe, 20 Pick. (Mass.) 252; Bebb v. Penoyre, 11 East, 160; Von Phul v. Hay, 122 Mo. 300, 26 S. W. 965.

of personalty, the meaning of the word "estate" may be thereby limited.⁴

Similar considerations prevail in the interpretation of the term "property," though its scope is naturally, perhaps, somewhat more extended than that of "estate." It will pass both realty and personalty, if there is nothing in the context to the contrary,⁵ and the legal presumption is in favor of this extended meaning of the word.⁶ The term includes choses in action,⁷ and the phrase "all my property of every description" covers everything, whether real or personal, vested or in expectancy, belonging to the testator.⁸ But the meaning may be circumscribed by the context. Thus a bequest of my property, consisting of bonds, mortgages, stocks, "etc.," will include only property of the same sort as that specifically enumerated.⁹ So the expression "all the property" may be confined, in view of all the language of the will, to personal estate remaining undisposed of after the termination of a life estate.¹⁰

Despite some conflict, it is now well settled that the word "effects," is confined to personal estate, and will not include real estate, unless, by the context, an intention appears to the contrary.¹¹ Unless thus enlarged or limited, it will include all the personal property of the testator.¹² Thus domestic animals housed on the home

⁴ But where a will directs the testator's estate to be divided between certain persons named, and the language of the whole will indicates an intention to dispose of all of his property, such will be the result, though he uses the word "bequeath." *Shumate v. Bailey*, 110 Mo. 411, 20 S. W. 178.

⁵ *Laing v. Barbour*, 119 Mass. 523; *Jackson v. Housel*, 17 Johns. (N. Y.) 281; *Dempsey v. Taylor*, 4 Tex. Civ. App. 126, 23 S. W. 220; *Soulard v. United States*, 4 Pet. 512, 7 L. Ed. 938; *In re Roberts*, 55 Law T. (N. S.) 498.

A bequest of all my "undivided interest and property" in the estate of the late C. does not carry money paid to the testator by the executor of C.'s estate after the execution of the will, but it does carry that part of the proceeds of land belonging to C.'s estate which remained in the hands of C.'s executor at testator's death. *Aydlett v. Small*, 115 N. C. 1, 20 S. E. 163.

⁶ 1 Jar. Wills, 664.

⁷ *Fogg v. Clark*, 1 N. H. 163; *Morrison v. Semple*, 6 Bin. (Pa.) 94; *Brown v. Dysinger*, 1 Rawle (Pa.) 408.

⁸ *Hurdle v. Outlaw*, 55 N. C. 75.

⁹ *Howland v. Howland*, 100 Mass. 223; *Howe's Appeal*, 126 Pa. 233, 17 Atl. 588.

¹⁰ *West v. Randle*, 79 Ga. 28, 3 S. E. 454. For further illustration of restrictions upon its meaning, see *Atty. Gen. v. Wiltseere*, 16 Sim. 36; *Brawley v. Collins*, 88 N. C. 605.

¹¹ *Andrews v. Applegate*, 223 Ill. 535, 79 N. E. 176, 12 L. R. A. (N. S.) 661, 7 Ann. Cas. 126; *Hawkins on Wills*, 55; *Doe dem. Hick v. Dring*, 2 M. & S. 448; *Doe dem. Haw v. Earles*, 15 M. & W. 450; *Reimer's Estate*, 159 Pa. 212, 28 Atl. 186.

¹² *Miner's Will*, 146 N. Y. 121, 40 N. E. 788; *Howe's Appeal*, 126 Pa. 233, 17 Atl. 588; *Hogan v. Jackson*, 1 Cowp. 304.

lot, but worked or pastured on an adjoining tract, are included in a devise of the homestead "with all the personal property and effects in the house and on the lot."¹³ But the will may disclose an intention to include real estate under the word, as where the testator speaks of "my said effects," referring to a previous devise of land,¹⁴ or where the devise is of all his "furniture, goods, chattels, and effects, whatsoever the same may be, or wheresoever the same may be situated."¹⁵

General Words Coupled with Enumeration

The effect of any general word in a will may be affected by the rule, of universal application in the construction of statutes or documents of any description, that where certain things are enumerated, and a more general description is coupled with the enumeration, that description is commonly to be understood to cover only things of a like kind with those enumerated.¹⁶ Thus where a bequest was made of "all my housekeeping articles, including all my household furniture, beds and bedding, kitchen and table furnishings, books and pictures, all my wardrobe, and all other articles of personal property in the house at the time of my death, belonging to me," it was held not to cover certain promissory notes belonging to the deceased.¹⁷ But the rule will give way to the clearly manifested intention of the testator to the contrary. Thus, where the will gave to a legatee "all the loose property in, on, or around the homestead,

¹³ *Martin v. Osborne*, 85 Tenn. 420, 3 S. W. 647.

But a bequest of "all the household furniture and effects" has been limited to "household effects" and held insufficient to convey other personal property. *Gallagher v. McKeague*, 125 Wis. 116, 103 N. W. 233, 110 Am. St. Rep. 821.

¹⁴ *Doe v. White*, 1 East, 33; *Den v. Trout*, 15 East, 394. And see *Marquis of Titchfield v. Horncastle*, 2 Jur. 610.

¹⁵ *Hall v. Hall* [1892] 1 Ch. 361. In this case testator used the word "devise" and the court placed emphasis upon that fact.

¹⁶ *Andrews v. Schoppe*, 84 Me. 170, 24 Atl. 805.

¹⁷ *Id.* For further illustrations, see *Petre v. Ferrers*, 61 Law J. Ch. 426, 65 Law T. (N. S.) 568; *Webb v. Webb* (1914) 111 Ark. 54, 163 S. W. 1167; *In re Reynolds*, 124 N. Y. 388, 26 N. E. 954 (where a devise of a certain building, "including all the furniture and personal property in and upon the same or in any manner connected therewith," was held not to pass title to money and securities contained in a safe in the building, where the will contained a residuary clause); *Woodcock v. Woodcock*, 152 Mass. 353, 25 N. E. 612 (where testator's gold watch was held not to pass under a clause in his will giving to his wife the homestead, "with the household furniture, silverware, musical instruments, books, pictures, horses, carriages, sleighs, harnesses, etc., used in connection therewith"); *Peaslee v. Fletcher's Estate*, 60 Vt. 188, 14 Atl. 1, 6 Am. St. Rep. 103; *Capehart v. Burrus*, 122 N. C. 119, 29 S. E. 97, 42 L. R. A. 152; *Ruffin v. Ruffin*, 112 N. C. 102, 16 S. E. 1021; *Creamer v. Harris* (1914) 90 Ohio St. 160, 106 N. E. 967, L. R. A. 1915C, 653; *Howe's Appeal*, 126 Pa. 233, 17 Atl. 588; *In re Hammersley*, 81 Law T. (N. S.) 150.

consisting of one cow, two hogs, and a lot of wood," and "all other property of every kind," the concluding clause carries to the legatee the entire residue of the personalty.¹⁸

WORDS OPERATIVE UPON REAL PROPERTY—GENERAL RULE

111. Any words, however untechnical and informal, which clearly indicate an intention on the part of the testator to pass his interest in the real property possessed by him, will be given that effect.

The cases have even gone to the extreme in applying general informal words to real estate. Thus the words "All I am worth" have been held to comprise land, in the will of an illiterate testator.¹⁹ So the words "whatsoever else I have not before disposed of" may pass a fee in lands,²⁰ as may also the words "whatever I may be possessed of at the time of my decease,"²¹ or the words "all of this world's goods of which I may be possessed."²² So words intrinsically applicable to personal estate may, by force of the context, be made to include land. This frequently happens where an expression is evidently used as referential to and synonymous with an anterior word, clearly descriptive of real estate, in which case its extent of operation is measured, not by its own inherent strength, but by the import of its synonym.²³ Even the expression "personal estates" will carry realty, if the testator has clearly shown his in-

¹⁸ *Taubenhan v. Dunz*, 125 Ill. 524, 17 N. E. 456. See, also, *In re Traylor's Estate*, 75 Cal. 189, 16 Pac. 774; *Sites v. Eldredge*, 45 N. J. Eq. 632, 18 Atl. 214, 14 Am. St. Rep. 769.

¹⁹ *Huxtep v. Brooman*, 1 B. C. C. 437.

²⁰ *Hopewell v. Ackland*, Salk. 239.

²¹ *Wilce v. Wilce*, 5 M. & Pay. 682; *Evans v. Jones*, 46 L. J. Ex. 280; *Davenport v. Coltman*, 9 M. & W. 481.

²² *TORREY v. TORREY*, 70 N. J. Law, 672, 59 Atl. 450, *Dunmore Cas. Wills*, 225.

²³ 1 Jar. Wills, 697.

Thus, where a testator, after devising certain lands to A., B., and C., and giving pecuniary legacies to B. and C., provided that, if either of the persons before named died without issue, then the said legacy should be divided equally between them that were alive, it was held that the word "legacy," in this clause, extended to the land before devised. *Hope dem. Brown v. Taylor*, 1 Burr. 268.

Semble: *Doe dem. Roberts v. Roberts*, 7 M. & W. 382; *Hughes v. Pritchard*, 6 Ch. D. 24; *Doe dem. Chillcott v. White*, 1 East, 83; *Wright v. Shelton*, 18 Jur. 445.

tention that it shall do so.²⁴ Words properly descriptive of personality only, are not extended to realty by ambiguous expressions.²⁵ And usually words naturally signifying realty or interests pertaining thereto are used.

"Lands"—"Tenements"—"Hereditaments"

These are the most exhaustive words of description applicable to real estate; the two latter including every species of realty, corporeal or incorporeal; the term "land" being more limited, and comprehending the surface of the ground, and everything upon and under it, but not, of itself, comprehending incorporeal hereditaments.²⁶ While, strictly, land cannot be described as appurtenant to land, as ordinarily a thing appurtenant to another is of a different nature from that to which it is appurtenant,²⁷ yet the intention of the testator governs, and the word "appurtenances" will have the significance which he has obviously given it. Thus a devise of "the house and lot, and appurtenances thereto belonging, wherein I now reside," was held to include three adjoining lots used by the testatrix as a homestead, and not merely the lot on which the house stood.²⁸ A devise of "my other land" includes a reversion in land devised by a former clause to the widow for life, when any other construction would result in partial intestacy.²⁹

"Real Estate"

This term is apparently substantially as broad as "tenements and hereditaments," as advowsons in gross will pass under the term, although it does not aptly describe such interests.³⁰ A devise of "all my real estate," where the testator owned 260 acres, will not be cut down by a description of the land as containing 160 acres.³¹ A devise of "the real estate" derived by the testatrix from her deceased son does not include land purchased by her at the foreclosure of mortgages bequeathed to her by her son.³² And a devise of all testator's real estate does not pass testator's leaseholds.³³

²⁴ Doe dem. Tofield v. Tofield, 11 East, 246.

²⁵ Doe dem. Haw v. Earles, 15 M. & W. 450.

²⁶ In re Handley's Estate, 208 Pa. 388, 57 Atl. 755.

²⁷ Lister v. Pickford, 34 Beav. 576.

²⁸ Myers v. Norman (Ky.) 46 S. W. 214. Semble: Otis v. Smith, 9 Pick. (Mass.) 293.

²⁹ Watson v. Watson, 110 Mo. 164, 19 S. W. 543.

³⁰ In re Hodgson, 67 Law J. Ch. 591, 79 Law T. (N. S.) 345.

³¹ In re Ehle's Estate, 73 Wis. 445, 41 N. W. 627.

³² Coles v. Coles (N. J. Ch.) 37 Atl. 1025.

³³ Orchard v. Wright-Dalton-Bell-Anchor Store Co., 225 Mo. 414, 125 S. W. 486, 20 Ann. Cas. 1072.

"Premises"

The former term means, strictly, "that which is before mentioned"; and, in this view, its scope is determined by the expression to which it refers,³⁴ but in its more usual sense it refers to a parcel of land, with its appurtenances.³⁵

"House"—"Homestead"

The devise of a house carries with it the ground upon which it stands, and everything accessory thereto and needful for its beneficial enjoyment, including land cultivated in connection with the occupation of the house,³⁶ and stables and outhouses which have been habitually used in connection therewith.³⁷ A devise of "the house and lot of land" described as situated on a certain street will pass a double house owned by the testator, and the land on which it stands, although this had originally consisted of two lots.³⁸

Similar principles control in the interpretation of the word "homestead."³⁹ Thus, where the testator owned part of a block divided into sublots, but without streets and alleys, on one corner of which was a house which he rented, and on another a dwelling house, with outbuildings, occupied by the testator, a devise of the homestead to his wife was held to include only that portion of the block occupied by the dwelling, and its appurtenances.⁴⁰ A devise of the "old homestead" will be understood as referring to that owned by the testator in his own right, and occupied by him at the time of his death.⁴¹ And a devise of a homestead to two children,

³⁴ 1 Jar. Wills, 734; Doe dem. Biddulph v. Meakin, 1 East, 456.

Thus, where a messuage and the furniture in it were devised to A. for life, and on his decease the said messuage and premises were to go to B., the word "premises" was held to include the furniture. Sanford v. Irby, 4 L. J. Ch. O. S. 23.

³⁵ Heming v. Willets, 7 C. B. 709; In re Handley's Estate, 208 Pa. 388, 57 Atl. 755.

³⁶ Blackburn v. Edgley, 1 P. Wms. 600; Lanning v. Sisters of St. Francis, 35 N. J. Eq. 392.

³⁷ Dudley v. Town of Milton, 176 Mass. 167, 57 N. E. 355; Bridge v. Bridge, 146 Mass. 373, 15 N. E. 899; McKeough's Estate v. McKeough, 69 Vt. 34, 37 Atl. 275; In re Blackmer's Estate, 66 Vt. 46, 28 Atl. 419.

³⁸ Webb v. Carney (N. J. Ch.) 32 Atl. 705.

³⁹ Unless a contrary intention is apparent, "homestead" in a will is construed as meaning the place where testator lived, and not as meaning the estate of homestead given by the homestead exemption act. Kennedy v. Kennedy, 105 Ill. 350.

⁴⁰ Smith v. Dennis, 163 Ill. 631, 45 N. E. 267.

The scope of the term may be much enlarged by the use of words of further description, as by a devise of "the homestead and land and premises thereunto belonging, upon which I now reside." Lord v. Simonson (N. J. Ch.) 42 Atl. 741.

⁴¹ Moore v. Powell, 95 Va. 258, 28 S. E. 172.

"to be divided equally between them," means a division equal in value rather than in area.⁴² A devise of all the testator's mixed property will not pass the homestead, even though partial intestacy thereby results.⁴³

"Farm"

While the common-law meaning was radically different,⁴⁴ its modern significance is well known, as that of a tract or tracts of land cultivated as a whole by an agriculturalist. A devise of a "farm" may include outlying tracts of land commonly known and treated by the testator as a part of it.⁴⁵ And all the land treated by the testator as composing a certain farm will pass under a devise of the farm, though a part of it be temporarily in the possession and control of another beneficiary, who was occupying it in connection with his occupancy of another farm.⁴⁶ A devise "of the homestead farm on which I reside" passes the farm on which the testator resided at the time the will was made.⁴⁷ A devise of a farm passes all the rights of the owner in the water thereon.⁴⁸

"Emblements"—"Crops"

While crops and emblements go to the personal representative, rather than to the heir,⁴⁹ yet the devisee of the land upon which they are growing takes them as against the executor, in the absence of an expressed intent on the part of the testator to the contrary,⁵⁰ and the proceeds of the sale of grass growing on his farm when the testator died go to the devisee of the farm for life.⁵¹ A devisee is entitled to the crops growing upon the land devised, although the will contains a bequest to another of all of testator's personal estate and effects, since there is no clearly expressed intention to deprive the devisee of the crops.⁵²

⁴² Sanderson v. Bigham, 40 S. C. 501, 19 S. E. 71.

⁴³ Schorr v. Etling, 124 Mo. 42, 27 S. W. 395.

⁴⁴ It originally signified "provisions," and came to be used as signifying the rent paid by an agricultural tenant for the land occupied by him. 2 Bl. Comm. 318.

⁴⁵ Scoville v. Mason, 76 Conn. 459, 57 Atl. 114; Gafney v. Kerrison, 64 N. H. 354, 10 Atl. 706.

⁴⁶ Chace v. Lamphere, 148 N. Y. 206, 42 N. E. 580.

⁴⁷ Ayer v. Estabrooks, 2 N. B. Eq. (Can.) 392.

⁴⁸ In re Fuller's Estate, 71 Vt. 73, 42 Atl. 981.

⁴⁹ Dennett v. Hopkinson, 63 Me. 350, 18 Am. Rep. 227.

⁵⁰ Thornton v. Burch, 20 Ga. 791; In re Chamberlain, 140 N. Y. 390, 35 N. E. 602, 37 Am. St. Rep. 568; Dunford v. Jackson's Ex'rs (Va.) 22 S. E. 853.

⁵¹ In re Chamberlain, supra. Semble: Busser v. Walter, 14 York Leg. Rec. 178.

⁵² Cooper v. Woolfitt, 2 H. & N. 122.

Further of Description of Realty

The general principles governing the admissibility of extrinsic evidence in connection with the description of realty have already been stated.⁵³ Some miscellaneous matters in that connection may be referred to here. Any description is sufficient which furnishes the means of identifying the property devised.⁵⁴ Land, instead of being accurately described, is frequently devised under a description by which it was commonly known. Evidence is always admissible to show the land comprised under such designation, and such land will pass under the will,⁵⁵ unless a clear intention to the contrary appears.⁵⁶

According to the prevailing view, a devise of a certain number of acres out of a larger tract, without identifying the particular land devised, gives the devisee the right to select any tract containing the specified number of acres that he chooses,⁵⁷ although it is sometimes held that under such circumstances the devisee takes an undivided interest in the entire tract.⁵⁸ A devise of land "to be valued

⁵³ Ante, p. 345.

⁵⁴ Taylor v. Taylor (1910) 174 Ind. 670, 93 N. E. 9.

Thus a will probated in a sister state, devising "the 160 acres in Lubbock county, Texas," was sufficient to pass land there owned by testator. Haney v. Gartin (1908) 51 Tex. Civ. App. 577, 113 S. W. 166.

Where there is nothing to suggest the contrary, a testator is to be understood as asserting that he owns the land which he assumes to devise, although he does not refer to it in any way as his land. Cummins v. Riordon, 84 Kan. 791, 115 Pac. 568. Compare: Lomax v. Lomax, 218 Ill. 629, 75 N. E. 1076, 6 L. R. A. (N. S.) 942.

⁵⁵ In re Potter, 83 Law T. (N. S.) 405; Beers v. Narramore, 61 Conn. 13, 22 Atl. 1061; Chace v. Lamphere, 148 N. Y. 206, 42 N. E. 580; Harper v. Anderson (1902) 130 N. C. 538, 41 S. E. 1021.

⁵⁶ Peebles v. Graham, 128 N. C. 218, 39 S. E. 24, where a devise of "all the lands included under the name of the Arnold, the Geer, and the Jones lands, all east of the K. Road," was held to pass no part of the Arnold land west of the road.

So a devise of land under a general description, whose extent is well defined, such as "all that tract of land, a part of which is known as the 'R. Place,'" will not be cut down by the words "containing 100 acres, more or less." Jones v. Quattlebaum, 31 S. C. 606, 9 S. E. 982. Semble: Cundiff v. Seaton (Ky.) 49 S. W. 179.

⁵⁷ Youmans v. Youmans, 26 N. J. Eq. 149; Lore v. Stiles, 25 N. J. Eq. 381; Galbraith v. Bowen, 5 Pa. Dist. R. 352; Young v. Young (1909) 109 Va. 222, 63 S. E. 748.

Where testator, who possessed three leasehold houses in K. street, bequeathed to P. "two houses in K. street," P. was permitted to elect which one he would take. Tapley v. Eagleton, 12 Ch. D. 683. And where testator owned two freehold closes in R. and devised one to J. and one to G., without designating which close either should take, the case was held to be one for election. Duckmanton v. Duckmanton, 5 H. & N. 219.

⁵⁸ Byrn v. Kleas, 15 Tex. Civ. App. 205, 39 S. W. 980.

at \$90 per acre" merely gives the devisee the option of purchasing from the residuary beneficiaries at that price.⁵⁹

A reference, in a will, to a deed, to identify the property devised, is sufficient, as the instrument thus referred to becomes incorporated for that purpose, and the devise only passes title to the land embraced within the description of such deed, although partial intestacy may result.⁶⁰ A general description of the property devised, "as the tract of land on which I now live," will prevail over a description by courses and distances.⁶¹ A devise by metes and bounds, and bounding "on the edge" of a pond owned by the testatrix, carries to low-water mark only, resulting in her intestacy as to the land covered by the lake.⁶² A description by metes and bounds generally prevails over other portions of the description,⁶³ but the whole language of the will and extrinsic circumstances may modify this rule somewhat.⁶⁴

A devise of a lot, and the buildings thereon, locating it on the corner of a street, will pass only the lot as originally numbered, though the testator owns another lot adjacent thereto.⁶⁵ And where unplatted lots which had never been numbered were devised as lots No. 1 and No. 2, the numbers will be construed as referring to the lots in the order in which they were purchased.⁶⁶

Rents and Profits

A devise of the rents and profits⁶⁷ or of the income⁶⁸ of land passes both the legal and equitable title to the land itself, in the

⁵⁹ Wyckoff v. Wyckoff, 48 N. J. Eq. 113, 21 Atl. 287.

⁶⁰ Oldham v. York, 99 Tenn. 68, 41 S. W. 333. See Ogsbury v. Ogsbury, 115 N. Y. 290, 22 N. E. 219.

A bequest of the deed of certain real estate has been held to be only a gift of such instrument. Matter of Lane's Will, 79 Misc. Rep. 71, 140 N. Y. Supp. 602.

⁶¹ Thomson v. Thomson, 115 Mo. 56, 21 S. W. 1085, 1128.

⁶² Kanouse v. Slockbower, 48 N. J. Eq. 42, 21 Atl. 197.

⁶³ Wales v. Templeton, 83 Mich. 177, 47 N. W. 238; Kilburn v. Dodd (N. J. Ch.) 30 Atl. 868.

⁶⁴ See Benjamin v. Welch, 73 Hun, 371, 26 N. Y. Supp. 156.

⁶⁵ Updegraff v. McCormick, 199 Pa. 590, 49 Atl. 290.

⁶⁶ McNally v. McNally, 23 R. I. 180, 49 Atl. 699.

A devise of lots referred to by the numbers on an assessors' map will pass only the land described on such map. Finelite v. Sinnott, 125 N. Y. 683, 25 N. E. 1089.

⁶⁷ Mayes v. Karn, 115 Ky. 264, 72 S. W. 1111; Co. Litt. 4b; 1 Jar. Wills, 741; Goldin v. Lákeman, 2 B. & Ad. 42; Ryan v. Allen, 120 Ill. 648, 12 N. E. 65; Sammis v. Sammis, 14 R. I. 123; Gidley v. Lovenberg, 35 Tex. Civ. App. 203, 79 S. W. 831.

The estate taken is only to the same extent that the rents or profits are

⁶⁸ See note 68 on following page.

absence of an intention to the contrary, as does also a devise of "one-half the proceeds."⁶⁹ But a gift of the rents and profits, followed by a provision for the sale of the real estate from which they are to accrue, shows an intent on the part of the testator not to pass the fee.⁷⁰ A bequest of the "ground rents of which I shall die seised" passes all such rents as the testator was possessed of at the time of his death,⁷¹ and a bequest of such rents may be construed as passing the reversionary interest.⁷² Although it has been held that rent due for the year of the testator's death for land devised by him goes to the residuary legatee, and not to the devisee,⁷³ on principle, by reason of the common-law rule that rent is an incident of the reversion and not apportionable as to time, it seems that any installment of rent falling due after testator's death should pass to the devisee.⁷⁴

Use and Occupation

A devise of the use and occupation of land passes an estate in the land to the extent of the use.⁷⁵ Under such a devise, the beneficiary may alienate his estate, and he is not confined to the personal use or occupancy of the property.⁷⁶ But directions to trustees to erect a house, which "shall and may be occupied by my daughter free of rent during her natural life," indicates an intention to pass to the daughter merely the right of personal use.⁷⁷

After-Acquired Property

The common-law rule that a will could not operate upon land acquired by the testator subsequent to its execution has been al-

given. *Morrison v. Schorr*, 197 Ill. 554, 64 N. E. 545. So a gift of rents and profits for life creates only a life estate. *Simmons v. Morgan*, 25 R. I. 212, 55 Atl. 522.

⁶⁸ *Mannox v. Greener*, L. R. 14 Eq. 456; *Scruggs v. Yancey*, 188 Ala. 682, 66 South. 23; *Lorton v. Woodward*, 5 Del. Ch. 505; *Mettler v. Warner*, 243 Ill. 600, 90 N. E. 1099, 134 Am. St. Rep. 388; *Ryan v. Allen*, 120 Ill. 648, 12 N. E. 65; *Earl v. Rowe*, 35 Me. 414, 58 Am. Dec. 714; *Beilstein v. Beilstein*, 194 Pa. 152, 45 Atl. 73, 75 Am. St. Rep. 692.

⁶⁹ *Hunt v. Williams*, 126 Ind. 493, 26 N. E. 177.

⁷⁰ *Collier v. Grimesey*, 36 Ohio St. 17.

⁷¹ *Brady v. Brady*, 78 Md. 461, 28 Atl. 515.

⁷² *Ogle v. Reynolds*, 75 Md. 145, 23 Atl. 137.

⁷³ *Parker v. Chestnutt*, 80 Ga. 12, 5 S. E. 289. In this case the court suggests that rent should be treated the same as emblements.

⁷⁴ *Bloodworth v. Stevens*, 51 Miss. 475; *Allen v. Van Houton*, 19 N. J. Law, 47; *Tiffany, Landlord and Tenant*, p. 1073.

⁷⁵ *Austin v. Hyndman*, 119 Mich. 615, 78 N. W. 663; *Jones v. Jones*, 28 Misc. Rep. 428, 59 N. Y. Supp. 974; *Moore v. Moore*, 84 N. J. Eq. 39, 92 Atl. 948.

⁷⁶ *Wilson v. Curtis*, 90 Me. 463, 38 Atl. 365; *Talbott v. Hamill* (1899) 151 Mo. 292, 52 S. W. 203.

⁷⁷ *Hadley v. Simmons* (N. J. Ch. 1901) 49 Atl. 816. Accord: *Le Breton v. Cook*, 107 Cal. 410, 40 Pac. 552.

most universally changed by statute. There is a conflict of authority as to whether these statutes are retroactive in their operation. As a will speaks only from the death of the testator, it is hard to see how the operation of such a statute upon a will made prior to its passage is a retroactive operation.⁷⁸ The language of these statutes varies, and whatever of conflict exists among the cases is due to this variance. Some provide that subsequently acquired realty may pass, if the testator's intent to that end manifestly appears;⁷⁹ others, that words of general import devising all the estate of the testator shall operate to pass subsequently acquired realty, unless a contrary intention shall appear;⁸⁰ others, that a testator shall have power to devise the real estate which he has at his death.⁸¹

It has been held that a will disposing of "all the estate I now own and possess" applies to realty subsequently acquired,⁸² even under a statute authorizing the passing of such realty only when "the intention is clear and explicit."⁸³ But where a will makes no specific reference to after-acquired property, and contains no clause under which such realty would have passed, even if the testator had owned it when the will was made, as to such realty, the testator dies intestate.⁸⁴ Subsequently acquired realty, used as appurtenant to other realty, will pass under a prior devise of such realty, "with

⁷⁸ *Welborn v. Townsend*, 31 S. C. 408, 10 S. E. 96, holding that a statute of this character operates upon a will executed prior to its passage. Contra: *Morgan v. Huggins* (C. C.) 42 Fed. 869, 9 L. R. A. 540, construing Code Ga. 1873, § 2461.

⁷⁹ Gen. Code Ohio 1910, § 10579, construed in *Wright v. Masters*, 81 Ohio St. 304, 90 N. E. 797, 135 Am. St. Rep. 790, 18 Ann. Cas. 165.

⁸⁰ Code D. C. § 1628, construed in *McAleer v. Schnelder*, 2 App. D. C. 461, holding that the intention need not be declared in express terms, it being enough that it can be reasonably made out from the terms of the will as a whole.

Act Pa. April 8, 1833 (P. L. 249), construed in *Williams v. Brice*, 201 Pa. 595, 51 Atl. 376; *Graham v. Grugan*, 132 Pa. 79, 19 Atl. 56; *Appeal of Price*, 169 Pa. 294, 32 Atl. 455.

N. J. Comp. St. 1910, p. 5870, construed in *Flummerfelt's Ex'rs v. Flummerfelt*, 51 N. J. Eq. 432, 26 Atl. 857.

So a will devising all one's estate, real, personal, and mixed, embraces subsequently acquired property, a contrary intent not being visible on the face of the will. *Paine v. Forsaith*, 84 Me. 66, 24 Atl. 590.

⁸¹ *Jones & A. Ann. St. Ill.* 1913, c. 148, par. 11542, construed in *Decker v. Decker*, 121 Ill. 341, 12 N. E. 750; *Mills' Ann. St. Colo.* 1912, § 7868, construed in *Clayton v. Hallett*, 30 Colo. 231, 70 Pac. 429, 59 L. R. A. 407, 97 Am. St. Rep. 117.

⁸² *Hodgkins v. Hodgkins*, 123 App. Div. 110, 108 N. Y. Supp. 173; *Haley v. Gatewood*, 74 Tex. 281, 12 S. W. 25.

⁸³ *Luers v. Luers*, 145 Iowa, 600, 124 N. W. 603, 139 Am. St. Rep. 453.

⁸⁴ *Bedell v. Fradenburgh*, 65 Minn. 361, 68 N. W. 41.

the land, outbuildings, and appurtenances thereto belonging.”⁸⁵ But devises of specific parcels of realty,⁸⁶ or of specific interests therein,⁸⁷ do not pass subsequently acquired realty or interests.

Personalty acquired by the testator, after the execution of a will disposing of all his property, passes under the will.⁸⁸ But bequests of specific items of property will not embrace after-acquired property or lapsed legacies.⁸⁹

Community Property

In certain jurisdictions, matrimonial gains and acquisitions are treated as community property belonging to the husband and wife. Though the husband has a legal right to exercise control and supervision over the whole of it, neither party can devise more than one-half.⁹⁰ So a devise to a wife “of one half of all my property of which I may die possessed,” and to the children the remaining half, gives to the wife one-half of the testator’s moiety in the community property.⁹¹ A will which nominates executors and expresses the wish that testator’s property “be considered and treated as community property,” and also states that the will is to protect testator’s wife, passes to the wife such property as she would have taken under the law of succession, had the property been community property.⁹²

⁸⁵ *In re Champion*, 62 Law J. Ch. 60, 67 Law T. (N. S.) 344.

⁸⁶ *Flynn v. Holman*, 119 Iowa, 731, 94 N. W. 447; *Teel v. Hilton*, 21 R. I. 227, 42 Atl. 1111.

Words descriptive of land then owned do not necessarily prevent after-acquired realty from passing. Thus a devise of “all the real estate that I may die seised of, being the land I now live on in said township of L.,” was held to pass after-acquired real estate. *Cummings v. Lohr*, 246 Ill. 577, 92 N. E. 970.

⁸⁷ *Hale v. Audsley*, 122 Mo. 316, 26 S. W. 963.

⁸⁸ *Nichols v. Allen*, 87 Tenn. 131, 9 S. W. 430; *Dalrymple v. Gamble*, 68 Md. 523, 13 Atl. 156.

Words denoting the present tense, as where gift is of “any other property that I may now possess,” pass after-acquired personalty. *Wagstaff v. Wagstaff*, L. R. 8 Eq. 229.

⁸⁹ *Kenaday v. Sinnott*, 179 U. S. 606, 21 Sup. Ct. 233, 45 L. Ed. 339.

⁹⁰ *Crosson v. Dwyer*, 9 Tex. Civ. App. 482, 30 S. W. 929; *Harvey v. Sutton*, 94 Tex. 79, 58 S. W. 833; *Skaggs v. Deskin* (Tex. Civ. App.) 66 S. W. 793.

⁹¹ *In re Gilmore’s Estate*, 81 Cal. 240, 22 Pac. 655.

⁹² *In re Claiborne’s Estate* (1910) 158 Cal. 646, 112 Pac. 278.

WORDS OPERATIVE TO PASS PERSONAL PROPERTY

112. The words "personal property," "effects," "goods," or "chattels," may operate to pass the entire personal estate of the testator, unless they are restrained by the context within narrower limits.

The above rule, broadly stated, is unquestioned.⁹³ And the word "things" may be used to include testator's entire personal property.⁹⁴ A gift of "household furniture, books, linen, wearing apparel, and all other goods and chattels," includes the whole of the personal property not otherwise disposed of.⁹⁵ But these words are readily restricted in meaning by the context.⁹⁶ Thus, where a will gave to the testator's wife "all my personal property; also the sum of \$50,000," the term personal property was held to apply only to personal effects, such as household furniture and the like.⁹⁷ So a bequest of "all horses * * * and all other personal property used in my butchering business, including all choses in action," does not pass a bank deposit not used exclusively in connection with the business indicated.⁹⁸ So the term "personal effects," in a bequest of "all my jewelry, wearing apparel, and personal effects," does not include personal property in the testator's house, such as furniture and pictures.⁹⁹ So a bequest of the goods and chattels at

⁹³ Personal property: *Appeal of Risk*, 110 Pa. 171, 1 Atl. 85; *Skinner v. Spann* (1911) 175 Ind. 672, 93 N. E. 1061, 95 N. E. 243.

Effects: *In re Miner's Will*, 146 N. Y. 121, 40 N. E. 788; *In re Price*, 169 Pa. 294, 32 Atl. 455; *Campbell v. Prescott*, 15 Ves. 500; *Hogan v. Jackson*, 1 Cowp. 304.

Goods: *Ryall v. Rolle*, 1 Atk. 180; *Anon.*, 1 P. Wms. 267; *Kendall v. Kendall*, 4 Russ. C. C. 370.

Chattels: *Co. Lit.* 118b; *Kendall v. Kendall*, 4 Russ. C. C. 370; *Gower v. Gower*, 2 Eden, 201; *Tilley v. Simpson*, 2 T. R. 659, note.

The terms "goods" and "chattels" seem substantially synonymous. If there is any distinction, the latter is somewhat broader in its scope.

⁹⁴ *IN RE ARNOLD'S ESTATE*, 240 Pa. 261, 87 Atl. 590, Ann. Cas. 1915A, 23, Dunmore Cas. Wills, 227.

⁹⁵ *Swinfen v. Swinfen*, 29 Beav. 207.

⁹⁶ The rule as to the effect of particular enumeration often operates in this connection. See ante, p. 353.

⁹⁷ *Tallman v. Tallman*, 3 Misc. Rep. 465, 23 N. Y. Supp. 734. See, also, *Duncan v. Berry's Adm'r*, 142 Ky. 178, 133 S. W. 1148, and *In re Gibbons' Estate*, 224 Pa. 37, 73 Atl. 183.

⁹⁸ *Koss v. Kastelberg*, 98 Va. 278, 36 S. E. 377.

⁹⁹ *In re Lippincott's Estate*, 173 Pa. 368, 34 Atl. 58. See, also, *Blackmer's Ex'r v. Blackmer*, 63 Vt. 236, 22 Atl. 600, holding that, in view of the context, the expression "other goods and chattels" did not include certain prom-

a particular place is confined to those which "savor of the locality."¹ Thus, where a bequest consisted of all the "real and personal property situated in G.," and the personal property consisted of notes of residents of G., the debts due from such residents were held to pass under the will.² But cotton stored under a buggy house is not in a "barn," within a will bequeathing the contents of the barns to the testator's wife.³ Under a clause giving to the wife of the testator "all articles of goods in my house, personal furniture, household furniture, and all that therein exists," money contained in an iron box in the house passes to the wife.⁴ But a safe is not "furniture," where there was a gift of a dwelling house, the furniture, and all the contents thereof, and the money and securities therein contained do not pass to the beneficiary.⁵ So a gift of a chest and its contents will not carry the land described in an undelivered deed contained in the chest; the deed not being property, but merely evidence of title.⁶

"Household Goods"

This term, with which "furniture" is substantially synonymous, includes everything of a permanent nature used in, purchased, or otherwise acquired by the testator or his house.⁷ The term "household effects" extends to all that is in the house for use, consumption, and ornament, and includes pistols, apparatus for turning, models, pictures, musical instruments, books,⁸ and liquors.⁹ Nei-

ssory notes, and *Gallagher v. McKeague*, 125 Wis. 116, 103 N. W. 233, 110 Am. St. Rep. 821, where a bequest of "all the household furniture and effects" was held to convey only household effects.

¹ 2 Wms. Ex'rs, 1179.

² *Ritch v. Talbot*, 74 Conn. 137, 50 Atl. 42.

³ *Johnson v. Johnson*, 48 S. C. 408, 26 S. E. 722.

⁴ *Perea v. Barela*, 5 N. M. 458, 23 Pac. 766. Accord: *In re Robson*, [1891] 2 Ch. 559; *Bromberg v. McArdle* (1911) 172 Ala. 270, 55 South. 805, Ann. Cas. 1913D, 855.

⁵ *Fenton v. Fenton*, 35 Misc. Rep. 479, 71 N. Y. Supp. 1083. Semble: *Ludwig v. Bungart*, 33 Misc. Rep. 177, 67 N. Y. Supp. 177; *Ball v. Dixon*, 83 Hun, 344, 31 N. Y. Supp. 990.

⁶ *Parrott v. Avery*, 159 Mass. 594, 35 N. E. 94, 22 L. R. A. 153, 38 Am. St. Rep. 465.

⁷ 2 Wms. Ex'rs, 1181. The term includes the ordinary furnishings of the house, in a strict sense (*Ruffin v. Ruffin*, 112 N. C. 102, 16 S. E. 1021); bric-a-brac and decorative articles (*Endicott v. Endicott*, 41 N. J. Eq. 93, 3 Atl. 157); books (*Ouseley v. Anstruther*, 10 Beav. 462); plate and china (*Chase v. Stockett*, 72 Md. 235, 19 Atl. 761).

⁸ *Cole v. Fitzgerald*, 1 S. & St. 189; *Stone v. Parker*, 29 L. J. Ch. 874. It does not include a pony, cow, or fowling piece, unless used for domestic defense (*Id.*); nor articles exclusively of personal adornment (2 K. & J. 635).

⁹ *Brinckerhoff v. Farias*, 52 App. Div. 256, 65 N. Y. Supp. 338.

ther term covers chattels which form a stock in trade,¹⁰ nor articles of clothing,¹¹ nor a watch,¹² nor farm equipments,¹³ nor a pleasure boat.¹⁴

"Money"

This term, in its strict sense, means cash on hand or on deposit.¹⁵ So, where a testator disposed of "all his personal property, consisting of household goods," and all his real estate, but no mention was made of money, he died intestate in regard to it, although the will expressed a purpose to dispose of all his property.¹⁶ So a bequest to certain persons of "the sum of one hundred each" is held to obviously refer to cash, and the word "dollars" will be supplied.¹⁷ But the word is notoriously used in a much wider, more indefinite, and elastic sense, and it may have any meaning which the testamentary intent, as manifested by the will, read in the light of proper evidence, imparts to it, such as personal property in general,¹⁸ debts due to the testator's trustee,¹⁹ reversionary interests in personalty,²⁰ ground rents,²¹ bonds and notes,²² unsatisfied judgments,²³ or even real estate.²⁴ Time deposits in a savings bank at a distance do not pass under a bequest of "money I may have on hand," and "money remaining at my decease," in the absence of

¹⁰ *Pratt v. Jackson*, 2 P. Wms. 302.

¹¹ *Scoville v. Mason*, 76 Conn. 459, 57 Atl. 114; *In re Kimball's Will*, 20 R. I. 619, 40 Atl. 847.

¹² *Woodcock v. Woodcock*, 152 Mass. 353, 25 N. E. 612; *Gooch v. Gooch*, 33 Me. 535.

¹³ *Stone v. Parker*, 29 L. J. Ch. 874.

¹⁴ *Dana v. Burke*, 62 N. H. 627.

¹⁵ *In re Hendrickson*, 140 App. Div. 388, 125 N. Y. Supp. 309; *Beck v. McGillis*, 9 Barb. (N. Y.) 35, 39; *Hancock v. Lyon*, 67 N. H. 216, 29 Atl. 638; *Parker v. Marchant*, 1 Y. & C. C. 290; *In re Levy's Estate*, 161 Pa. 189, 28 Atl. 1068.

¹⁶ *Meyer v. Rusterholtz*, 23 Ind. App. 569, 55 N. E. 870.

¹⁷ *In re Schweigert's Estate*, 17 Misc. Rep. 186, 40 N. Y. Supp. 979.

¹⁸ *Mt. Holly Safe Deposit & Trust Co. v. Deacon* (1911) 79 N. J. Eq. 120, 81 Atl. 356; *Sweet v. Burnett*, 136 N. Y. 204, 32 N. E. 628; *Decker v. Decker*, 121 Ill. 341, 12 N. E. 750; *Fry v. Shipley*, 94 Tenn. 252, 29 S. W. 6; *Goods of Bramley*, [1902] P. 106, 85 L. T. N. S. 645, 4 B. R. C. 546, and note.

¹⁹ *Dillard v. Dillard*, 97 Va. 434, 34 S. E. 60.

²⁰ *In re Egan*, 68 Law J. Ch. 307, [1899] 1 Ch. 688, 80 Law T. (N. S.) 153.

²¹ *In re Strawbridge's Estate*, 18 Pa. Co. Ct. R. 485.

²² *Hinckley v. Primm*, 41 Ill. App. 579; *Pohlman v. Pohlman*, 150 Ky. 679, 150 S. W. 829; *Hamilton v. Serra*, 6 Mackey (D. C.) 168.

²³ *Summerhill v. Hanner*, 72 Tex. 224, 9 S. W. 881.

²⁴ *In re Miller's Estate*, 48 Cal. 165, 22 Am. Rep. 422; *Appeal of Jacobs*, 140 Pa. 268, 21 Atl. 318, 11 L. R. A. 767, 23 Am. St. Rep. 230.

But the word "money" will be construed to include real estate only when the intention so to use it "is clearly manifest on the face of the will, and put beyond all reasonable doubt." *Sweet v. Burnett*, 136 N. Y. 204, 32 N. E. 628.

further evidence of intention to that end.²⁵ Nor will the testator's interest in money deposited to the credit of a firm of which he was a member, pass under a devise of "all the money in the house and bank or on hand at the time of my death."²⁶

"Stock"

The term "stock" means primarily shares in a corporation,²⁷ but it will be construed as describing the testator's deposits in various savings banks, where he had no shares of stock in any bank or other property in banking associations,²⁸ or loan certificates, when such is its obvious meaning.²⁹ So a bequest of "my shares" in a railroad company may apply to debenture stock,³⁰ and a bequest of "twelve shares in the steam barge J." may be construed as applying to 240 shares of the stock of a company owning and operating the barge, of the par value of \$50; it appearing that the testator always referred to his interest as shares of \$1,000 each.³¹ So a bequest of bank stock will include the stock in which the testatrix is beneficially interested as well as that standing in her own name.³²

The par value of the stock is to be referred to in determining the amount of stock called for by a bequest of "gas stock to the extent of \$6,000," to be delivered six years after the testator's death,³³ or by a bequest of "\$500 of bank stock."³⁴ But a bequest of "one thousand dollars, either in stocks or money," enables the legatee to elect to take one thousand dollars' worth of stocks at their market value.³⁵ And a remainderman in the case of stock whose income is bequeathed to another for life, is entitled to the actual value of the shares, including the accumulated surplus or undivided earnings, at the time of the testator's death.³⁶

²⁵ *Hancock v. Lyon*, 67 N. H. 216, 29 Atl. 638.

²⁶ *In re Wilkinson's Estate*, 192 Pa. 127, 43 Atl. 411.

²⁷ *Capehart v. Burrus*, 122 N. C. 119, 29 S. E. 97, 42 L. R. A. 152, holding a bequest of "all my notes, bonds, stock, and money on hand" could not refer to live stock, and that the fact that the testator had no "stock," but much "live stock," could not be considered to affect the construction.

So a bequest of "stocks that I have on interest" does not include a mortgage bearing interest. *In re Bradley's Estate*, 238 Pa. 440, 86 Atl. 291.

²⁸ *Tomlinson v. Bury*, 145 Mass. 346, 14 N. E. 137, 1 Am. St. Rep. 464. Here the bequest was of bank stock.

²⁹ *In re Conley's Estate*, 197 Pa. 291, 47 Atl. 238.

³⁰ *In re Weeding*, [1896] 2 Ch. 364. See *In re Bodman*, [1891] 3 Ch. 135.

³¹ *Oades v. Marsh*, 111 Mich. 168, 69 N. W. 251.

³² *Angell v. Home for Aged Women*, 157 Mass. 241, 31 N. E. 1064.

³³ *In re Johnson's Estate*, 170 Pa. 177, 32 Atl. 636.

³⁴ *Partner v. Citizens' Loan & Trust Co.*, 163 Ind. 303, 71 N. E. 894.

³⁵ *Graham v. De Yampert*, 106 Ala. 279, 17 South. 355.

³⁶ *Lang's Ex'r v. Lang*, 56 N. J. Eq. 603, 40 Atl. 278. So a legatee of stock is entitled to dividends declared after testator's death, where they are not apportionable. *In re Kane*, 64 App. Div. 566, 72 N. Y. Supp. 333.

"Bonds"—"Mortgages"—"Securities"

The word "bonds" will include ordinary notes held by the testator, where such a construction effectuates testator's intention.³⁷ A bequest of bonds "left by her late husband" will pass bonds purchased by the testatrix with the proceeds of an insurance policy upon her husband's life, where these were the only bonds belonging to the testatrix.³⁸ And the bequest of a bond carries with it an attached overdue interest coupon.³⁹ A direction to trustees to invest a certain amount in bonds requires the purchase of bonds of the face value of that amount.⁴⁰

The bequest of a mortgage, including the obligation secured thereby, includes interest accrued up to the time of the testator's death.⁴¹ And the bequest of a mortgage will ordinarily include the instrument secured thereby.⁴² An attempted devise of specific realty by the mortgagee of the property covered by the mortgage shows testator's intention to pass the mortgage and has that effect,⁴³ although there is authority for the view that a specific devise of land does not pass a mortgage thereon held by testator.⁴⁴

Although the word "securities" does not include mere debts,⁴⁵ in its broadest sense it embraces bonds, certificates of stock, notes, and all other evidences of debt.⁴⁶

Life Insurance

A bequest of all of the testator's property carries the money due on life insurance policies which are payable to his legal representatives.⁴⁷ The common statutory provisions with regard to the distribution of money derived from life insurance do not affect insurance derived by the testator as beneficiary under a policy upon the life of another.⁴⁸

³⁷ *Schoonmaker v. Mitchell's Adm'x*, 144 Ky. 794, 139 S. W. 968.

³⁸ *In re Bradley's Will*, 73 Vt. 253, 50 Atl. 1072.

³⁹ *Ogden v. Pattee*, 149 Mass. 82, 21 N. E. 227, 14 Am. St. Rep. 401. *See* also: *Sanborn v. Clough*, 64 N. H. 315, 10 Atl. 678.

⁴⁰ *Wisner v. Kleinhans*, 69 Mich. 307, 37 N. W. 290.

⁴¹ *In re Clark's Estate*, 16 Misc. Rep. 405, 39 N. Y. Supp. 722.

⁴² *Klock v. Stevens*, 20 Misc. Rep. 383, 45 N. Y. Supp. 603.

⁴³ *Weed v. Hoge*, 85 Conn. 490, 83 Atl. 636, Ann. Cas. 1913C, 542; *Batley v. Batley*, 94 Neb. 729, 144 N. W. 786; *Woodhouse v. Meredith*, 1 Mer. 450.

⁴⁴ *Marshall's Ex'rs v. Hadley*, 50 N. J. Eq. 547, 25 Atl. 325.

A mortgage held by testator at his death does not pass under a devise of the property mortgaged, where testator owned the fee at the time he made the devise. *In re Clowes*, 1893, 1 Ch. 214, 41 Wkly. Rep. 69.

⁴⁵ *In re Mason*, 34 Beav. 494, 55 Eng. Reprint, 726.

⁴⁶ *Stark's Will* (1912) 149 Wis. 631, 134 N. W. 389.

⁴⁷ *Fox v. Senter*, 83 Me. 295, 22 Atl. 173. *See* also, *Aveling v. Northwestern Masonic Aid Ass'n*, 72 Mich. 7, 40 N. W. 28, 1 L. R. A. 528.

⁴⁸ *Small v. Jose*, 86 Me. 120, 29 Atl. 976.

Interest and Income

A gift of the interest, income, or product of a fund, without limit as to time, will pass the fund itself.⁴⁹ And where a beneficiary is given an unrestricted interest in the income of a fund during his life, he may, in the absence of a statute, alienate it, either wholly or in part, before the time fixed for payment.⁵⁰ A bequest giving the beneficiary the "use" of a certain fund during life allows her only the interest thereon, and gives her no right to consume any of the principal.⁵¹ The bequest of the interest and profits of a certain sum to a beneficiary for life gives her the right to the income from the fund, as increased by advantageous manipulation, but she is not entitled to the increase of the fund as such.⁵²

Miscellaneous

A bequest of "other articles" of domestic use or ornament has been held to include valuable orchids which were from time to time brought into the house from the gardens for the purpose of decoration.⁵³ But "articles of personal use and ornament" do not include a sailing yacht.⁵⁴ The assets of a business include a judgment obtained by the testator for goods sold in such business.⁵⁵ And a bequest of "all securities for money" includes purchase money for which the testator had a vendor's lien.⁵⁶

⁴⁹ *Wilkinson v. Rosser's Ex'r*, 31 Ky. Law Rep. 1262, 104 S. W. 1019; *Bishop v. McClelland's Ex'rs*, 44 N. J. Eq. 450, 16 Atl. 1, 1 L. R. A. 551; *Lorton v. Woodward*, 5 Del. Ch. 505, where the bequest was to the beneficiary and his heirs; *In re Thompson's Estate*, 234 Pa. 82, 82 Atl. 1108.

⁵⁰ *Caldwell v. Boyd*, 109 Ind. 447, 9 N. E. 912.

⁵¹ *Leahy v. Cardwell*, 14 Or. 171, 12 Pac. 307; *Diehl v. Middle States Loan, Bldg. & Const. Co.* (1913) 72 W. Va. 74, 77 S. E. 549.

⁵² *First Nat. Bank v. Lee* (Ky.) 66 S. W. 413. See, also, *Boardman v. Mansfield*, 79 Conn. 634, 66 Atl. 169, 12 L. R. A. (N. S.) 793, 118 Am. St. Rep. 178.

⁵³ *In re Owen*, 78 Law T. (N. S.) 643.

⁵⁴ *In re Parry's Estate*, 188 Pa. 33, 41 Atl. 448, 49 L. R. A. 444, 68 Am. St. Rep. 847.

⁵⁵ *In re Quin*, 1 Con. Sur. 381, 5 N. Y. Supp. 261.

A gift of a business and all accounts, claims, and debts belonging thereto does not pass a bank account made up of deposits arising from the receipts of the business. *Wyatt v. Norris*, 66 W. Va. 667, 66 S. E. 1016.

⁵⁶ *Callow v. Callow*, 42 Ch. Div. 550.

THE RESIDUARY CLAUSE AS AN INSTRUMENT OF DESCRIPTION

113. The residuary clause in a will is that which disposes of property of the testator not otherwise disposed of.

114. There is a presumption that one who makes a will intends to dispose of all of his property, and a residuary clause will pass all the property not in terms otherwise disposed of, unless it is manifestly insufficient to that end. A general residuary gift of personal estate carries, not only all personalty not in terms disposed of, but personalty that turns out not to be well disposed of.

There is no question as to this doctrine.⁵⁷ Where the will contains a general residuary clause, in order to exclude a particular property belonging to the testator, and not otherwise disposed of, a plain and unequivocal intention on the part of the testator to exclude that property from the operation of the clause must be manifested.⁵⁸ Thus, where a testatrix, by mistake, recited that she had settled a particular property upon a certain person, which was not the fact, the property being still at her disposal, and the will contained a residuary bequest, the property mentioned as having been settled was held to pass to the residuary legatee.⁵⁹ And where the testator bequeathed certain specific legacies, with a residuary clause, and afterwards sold the subject-matter of the specific legacies, and invested the proceeds in bonds which he held at the time of his death, the bonds were held to pass under the residuary clause.⁶⁰ So, where a residuary clause gives the residue of the testatrix's estate to be expended in fixing up her burial lot and erecting a "suitable and proper" monument thereon, the requirement that all the residue shall be thus used is not cut down by describing

⁵⁷ 1 Jar. Wills, 716; *BATES v. KINGSLEY*, 215 Mass. 62, 102 N. E. 306, Dunmore Cas. Wills, 205, 230.

⁵⁸ *Morton v. Woodbury*, 153 N. Y. 243, 47 N. E. 283; *In re Bagot*, [1893] 3 Ch. 348; *Prison Association v. Russell's Adm'r*, 103 Va. 563, 49 S. E. 966.

⁵⁹ *In re Bagot*, *supra*.

Where testator made no attempt to dispose of certain property in terms, because he did not know that it belonged to him, such property passed by a general residuary clause in his will. *Smith v. Dugan*, 145 App. Div. 877, 130 N. Y. Supp. 649.

⁶⁰ *Hosea v. Skinner*, 32 Misc. Rep. 653, 67 N. Y. Supp. 527. For further illustrations of this principle, see *Rollins v. Haven*, 69 N. H. 415, 45 Atl. 141; *Meeks v. Meeks*, 161 N. Y. 66, 55 N. E. 278; *Weed v. Scofield*, 73 Conn. 670, 49 Atl. 22; *Bushby v. Newhall* (1912) 212 Mass. 432, 98 N. E. 1032.

the intended monument as suitable and proper.⁶¹ But the testator's intention governs. Thus a residuary clause reciting that "all the rest and residue of my property, personal and mixed," shall go to a certain beneficiary, does not serve to carry the testator's realty.⁶²

A general residuary bequest carries lapsed and void legacies,⁶³ and property which is the subject of a devise which fails by reason of a misdescription.⁶⁴ So a gift of the residue is not defeated by the failure of the primary gift, but will include all the estate remaining after the payment of debts and administration expenses.⁶⁵ The most important exception to the comprehensiveness of a general residuary clause is that it does not include any part of the residue itself which fails.⁶⁶ Thus, where a testator gave the residue of his estate to his sisters and his brother in equal shares, and afterwards made a codicil revoking the bequest to the brother, it was held that the share which would have gone to the brother did not pass to the sisters under the residuary clause, but went to the next of kin.⁶⁷ This doctrine has been criticised,⁶⁸ and is sometimes

⁶¹ *Davis v. Chase*, 181 Mass. 39, 62 N. E. 959. See, also, *Rollins v. Haven*, 69 N. H. 415, 45 Atl. 141 (where testator was mistaken as to the amount of the residue).

⁶² *Miller v. Worrall*, 62 N. J. Eq. 776, 48 Atl. 586, 90 Am. St. Rep. 480. See *Foster v. Smith*, 156 Mass. 379, 31 N. E. 291.

⁶³ *Hughes v. Allen*, 31 Ga. 489; *Drew v. Wakefield*, 54 Me. 296; *Dexter v. Harvard College*, 176 Mass. 192, 196, 57 N. E. 371; *Firth v. Denny*, 2 Allen (Mass.) 471; *Burrage v. Briggs*, 120 Mass. 103; *Lewis v. Lusk*, 35 Miss. 422; *Tindall v. Tindall's Ex'rs*, 23 N. J. Eq. 244; *Morton v. Woodbury*, 153 N. Y. 243, 47 N. E. 283; *Swinton v. Egleston*, 3 Rich. Eq. 204; *Easum v. Appleford*, 5 Myl. & Cr. 61.

⁶⁴ *Eckford v. Eckford* (Iowa) 53 N. W. 345.

⁶⁵ *In re Miller's Will*, 161 N. Y. 71, 55 N. E. 385.

⁶⁶ *Lyman v. Coolidge*, 176 Mass. 7, 56 N. E. 831; *Beekman v. Bonsor*, 23 N. Y. 312, 80 Am. Dec. 269; *In re Wood's Will*, 29 Beav. 236; *Lloyd v. Lloyd*, 4 Beav. 231.

⁶⁷ *Waln's Estate*, 156 Pa. 194, 27 Atl. 59. See *In re Gray's Estate*, 147 Pa. 67, 23 Atl. 205; *Humble v. Shore*, 7 Hare, 247, discussed in *Hawkins on Wills*, 42.

"Residue means all of which no effectual disposition is made by the will, other than the residuary clause; but, when the disposition of the residue itself fails, to the extent to which it fails the will is inoperative. In the lapsing of a residue given in moieties, to hold that one moiety lapsing should accrue to another would be to hold that a gift of a moiety of the residue shall eventually carry the whole." *Skrymsner v. Northcote*, 1 Swanst. 570. See *Chadwick v. Chadwick*, 37 N. J. Eq. 71; *Kerr v. Dougherty*, 79 N. Y. 327.

Where legacies are given to several legatees, and the residue is bequeathed to the same legatees, the residue will not include a lapsed legacy of one of them. *Lombard v. Boyden*, 5 Allen (Mass.) 251; *Smith v. Haynes*, 111 Mass. 346; *Craighead v. Given*, 10 Serg. & R. (Pa.) 353.

⁶⁸ *Big. Wills*, 323. And see *In re Gray's Estate*, 147 Pa. 67, 23 Atl. 205.

changed by statute.⁶⁹ Even if the doctrine is recognized, it should not be applied where the will directs that, upon a failure of a gift of a share in the residue, the lapsed share is to fall back into the residue.⁷⁰

A general residuary clause followed by an enumeration of the particular property upon which it is to operate is not confined in its operation to such property, but the clause covers all property not otherwise disposed of by the will.⁷¹ Thus a bequest by testatrix of all the remainder of her personal property, consisting of clothing, jewelry, and stock, was sufficient to pass money in a savings bank belonging to testatrix.⁷²

General bequests of chattels of a particular kind carry all the chattels of that kind which the testator is possessed of at the time of his death, such as mortgages, stocks, or furniture.⁷³ By analogy to a bequest of all the personal estate, a bequest of a particular residue is held to include all of the particular kind which is not effectually disposed of.⁷⁴

Where the same will contains several general residuary clauses, the first apparently prevails, for, reading the instrument as written, and giving the word "residue" its usual meaning, there is nothing for the subsequent clauses to act upon.⁷⁵

A general residuary bequest, contingent in terms, carries the intermediate income, which is not undisposed of, but accumulates.⁷⁶

⁶⁹ In Ohio, if part of the residuary gift lapses and the residuary devisee who survives is a relative of testator, the lapsed portion of the residuum passes to the surviving devisee, unless a different disposition is required by the will. Gen. Code Ohio 1910, § 10581.

⁷⁰ In re Allan, [1903] 1 Ch. 276, 3 B. R. O. 145; In re Palmer, [1893] 3 Ch. 369.

⁷¹ In re Miner's Will, 146 N. Y. 121, 40 N. E. 788. Contra: Williams v. McKeand, 119 Mich. 507, 78 N. W. 553, 75 Am. St. Rep. 420. While these cases apparently conflict, it may be doubted if there is any real conflict in principle. The language of the two wills varied materially, and the decision in the New York case was influenced by very significant extrinsic evidence.

⁷² In re Morrissey's Will, 72 Misc. Rep. 573, 131 N. Y. Supp. 986.

⁷³ 1 Jar. Wills, 720.

⁷⁴ De Trafford v. Tempest, 21 Beav. 564 (here, after a bequest of certain chattels in a certain house, all other chattels in the house were given to a certain beneficiary, with a general residuary clause over. The first bequest lapsing, its subject-matter fell into the particular residue, and passed to that beneficiary); Cook v. Oakley, 1 P. Wms. 302.

⁷⁵ Wheeler v. Brewster, 68 Conn. 177, 36 Atl. 32. Semble: Plummer v. Shepherd, 94 Md. 466, 51 Atl. 173.

⁷⁶ Hawkins, Wills, 43; Trevanion v. Vivian, 2 Ves. Sr. 430; Bullock v. Stones, 2 Ves. Sr. 521.

Thus, if a testator bequeaths the residue of his personal estate to such son of A. as shall first become of age, and A. has no son at the testator's death,

Residuary Clause as Affecting Realty

While, prior to modern legislation, the operation of a residuary clause upon realty differed materially from its operation on personalty, owing to the testator's inability to devise subsequently acquired realty, and to the rule that the heir should be favored at the expense of a devisee, which led to intestacy in the case of lapsed devises, under present statutes the realty owned by the testator at the time of his death, and not otherwise disposed of, passes under a general residuary clause whose language is broad enough to include real estate,⁷⁷ as does generally realty comprised in devises which fail or are void.⁷⁸ But where the statute requires that an intention to devise after-acquired land must appear expressly in the will, such land will not pass under a devise of the residue of the testator's estate.⁷⁹

A codicil revoking a specific devise, and containing no disposition of the property, causes the land to pass under the residuary clause of the will.⁸⁰

Form of Residuary Clause

While the words "rest," "residue," or "remainder," are commonly used in the residuary clause, and its natural position is at the end

the income of the residue does not go to the next of kin, but accumulates in trust for a son of A. who may come into existence. Hawkins, Wills, supra.

⁷⁷ Hale v. Hale, 125 Ill. 399, 17 N. E. 470 ("rest of my estate"); Grimes v. Smith, 70 Tex. 217, 8 S. W. 33 ("balance of my estate." Accord: Webb v. Archibald, 128 Mo. 299, 34 S. W. 54); Chapman v. Chick, 81 Me. 109, 16 Atl. 407 (rest and residue of testator's property and estate of every description, wherever situate); Carter v. Gray, 58 N. J. Eq. 411, 43 Atl. 711 (residue of the "estate and property"); In re McGovran's Estate, 190 Pa. 375, 42 Atl. 705 ("rest and residue of my estate"); Lombard v. Witbeck, 173 Ill. 396, 51 N. E. 61 (as in preceding case); Ruckle v. Grafflin, 86 Md. 627, 39 Atl. 624 (remainder of "my effects"); White v. Keller, 15 C. C. A. 683, 68 Fed. 796 (residue of "property and effects"); Hale v. Audsley, 122 Mo. 316, 26 S. W. 963 (all he "may now have or hereafter may acquire"); Lamb v. Lamb, 60 Hun, 577, 14 N. Y. Supp. 206 ("surplus undisposed of").

Realty passes under a residuary clause using the words "give and bequeath," although the word "devise" is not used therein. Rickman v. Meler, 213 Ill. 507, 72 N. E. 1121.

⁷⁸ In re Russell's Estate, 150 Cal. 604, 89 Pac. 345; Lovering v. Lovering, 129 Mass. 97; Duckworth v. Jordan, 138 N. C. 520, 51 S. E. 109. St. 1 Vict. c. 26, § 25, provides that, in the absence of an apparent intention to the contrary, a lapsed or void devise shall be included in the residuary devise. This legislation has been widely, though not universally followed in the United States.

⁷⁹ In re Pierce, 20 R. I. 380, 39 Atl. 430; Church v. Warren, 14 R. I. 539. In view of the tendency of the courts to give words in a general residuary clause the widest possible scope, the correctness of these decisions may be doubted.

⁸⁰ Giddings v. Giddings, 65 Conn. 149, 32 Atl. 334, 48 Am. St. Rep. 192.

of the disposing portion of the will, yet these words are not necessary, and the clause may occur in any portion of the will.⁸¹ The word "balance" is equivalent to "residue."⁸² The mere appointment of one as "residuary legatee", may be sufficient to pass to such person all residuary realty and personalty.⁸³ All that is necessary is an adequate designation of what has not otherwise been disposed of.⁸⁴ But the devise of the whole of an estate cannot be a residuary devise.⁸⁵

⁸¹ *Goods of Jupp*, [1891] Prob. 300; *Morton v. Woodbury*, 153 N. Y. 243, 47 N. E. 283; *Cheney v. Plumb*, 79 Wis. 602, 48 N. W. 668; *Sherman v. Baker*, 20 R. I. 446, 40 Atl. 11, 40 L. R. A. 717.

⁸² *In re Taylor's Estate*, 239 Pa. 153, 86 Atl. 708; *In re Reimer's Estate*, 159 Pa. 212, 28 Atl. 186.

Compare *Davis v. Davis*, 62 Ohio St. 411, 57 N. E. 317, 78 Am. St. Rep. 725, where the court refused to allow the residue of an estate to pass under a bequest of "the balance."

⁸³ *Dann v. Canfield*, 197 Mass. 591, 84 N. E. 117, 14 Ann. Cas. 794; *Laing v. Barbour*, 119 Mass. 523.

⁸⁴ Thus a will giving to a beneficiary "all other property of which I shall die seised" is sufficient to pass an interest under a life insurance policy. *Aveling v. Aid Ass'n*, 72 Mich. 7, 40 N. W. 28, 1 L. R. A. 528. So the language, "I appoint E. my legatee, and give to her all not before specified in this," makes E. residuary legatee. *Wyman v. Woodbury*, 86 Hun, 277, 33 N. Y. Supp. 217. So with the words of an illiterate testatrix, writing her own will, "When I have done with my property, I want C. and his wife to pay all my debts, and collect my dues, and dispose of my things as they think best." *Cheney v. Plumb*, 79 Wis. 602, 48 N. W. 668. And a direction that the residue of the estate be "paid" to a son is sufficient to pass all property not otherwise disposed of. *Singer v. Taylor*, 90 Kan. 285, 133 Pac. 841.

⁸⁵ *Jewett v. Jewett*, 21 Ohio Cir. Ct. R. 278, 12 O. C. D. 131.

CHAPTER XV

CONSTRUCTION (Continued)—DESCRIPTION OF BENEFICIARY

- 115. General Rule—Technical and Non-Technical Terms.
- 116. Beneficiaries Described as a Class.
- 117-118. Common-Law Rule in Event of Lapse—As Modified by Statute.
- 119-120. Time of Ascertaining the Members of a Class.
- 121. Taking Per Capita or Per Stirpes.

GENERAL RULE—TECHNICAL AND NON-TECHNICAL TERMS

115. Beneficiaries, to take, must answer the description and character given them in the will. In determining who answer this description (i. e., in ascertaining the scope and significance of a number of terms commonly used in designating beneficiaries, and capable of two or more meanings), a number of rules have been adopted, based largely upon the ordinary and natural significance of the terms used, but partly upon their historical and technical meaning. The beneficiary must be identified with legal certainty; otherwise, to that extent, the will fails.

In the case of non-technical words, the ordinary popular meaning is the primary one, unless an intention to use them in a secondary sense appears on reading the will in the light of admissible testimony. Technical terms are understood as having their technical meaning for the primary one, unless, under the same circumstances, an intention to use them in a secondary sense appears.¹ The remainder of the chapter furnishes abundant illustration. In any event, the beneficiary must be identified, or be capable of identification, with legal certainty.² Thus, where a farm was devised to one of the testator's sons, without specifying which, on condition that he should live on the farm and care for the testator's mother and sister until their death, and three sons lived, in succession, upon the farm until the mother's death, when the sister declined to allow a

¹ See Big. Wills, pp. 194, 200.

² The beneficiary need not be named in the will. Thus, a devise to the one who shall take care of testatrix, whose claim shall be evidenced by a written request for such services signed by testatrix, is valid. *Dennis v. Holsapple*, 148 Ind. 297, 47 N. E. 631, 62 Am. St. Rep. 526, 46 L. R. A. 168.

fourth son to live on the farm, it was held, in an action by the heir of the first son to recover the farm, that the condition had not been sufficiently performed, and that the devise was void for uncertainty.³ And a bequest to executors to use as they see proper is also void for uncertainty.⁴ A bequest to a corporation, to be created after the testator's death, is not void for uncertainty.⁵ Neither does a change of name in the beneficiary corporation affect the validity of a bequest, by reason of uncertainty.⁶

It is now proposed to discuss the interpretation put upon some of the terms in common use by testators, discussing first those having a non-technical or popular meaning:

"Family"

Though formerly a gift to a person's family was void for uncertainty,⁷ the courts now sustain such a gift, if possible. As a general rule, in the absence of a contrary intention, a bequest of personal estate to the family of a person means *prima facie* his children.⁸ But the word is extremely flexible, and no hard and fast rule can be laid down concerning it.⁹ A bequest to the family of a certain person does not include the latter,¹⁰ and the term does not include children born subsequent to the death of the testator,¹¹ nor a stepson,¹² unless that intent is manifest. *Prima facie*, an illegitimate child who is a member of the household is included.¹³ The term, used in

³ *Whitesides v. Whitesides*, 28 S. C. 325, 5 S. E. 816. See, also, *In re Stephenson* (1897) 1 Ch. 75.

⁴ *In re Casey's Estate* (1910) 111 Minn. 43, 126 N. W. 401, 137 Am. St. Rep. 531.

⁵ *Tilden v. Green* (Sup.) 2 N. Y. Supp. 584.

⁶ *Elwell v. Universalist Convention*, 76 Tex. 514, 13 S. W. 552.

⁷ *Harland v. Trigg*, 1 B. C. C. 142; *Rollinson v. Waddelow*, 8 Sim. 134.

⁸ *Hoadly v. Wood*, 71 Conn. 452, 42 Atl. 263; *Raynolds v. Hanna* (C. C.) 55 Fed. 783; *Heck v. Clippenger*, 5 Pa. 388; *Stuart v. Stuart*, 18 W. Va. 675; *Barnes v. Patch*, 8 Ves. 604; *Gregory v. Smith*, 9 Hare, 708; *Burt v. Hillyar*, L. R. 14 Eq. 160; *Moredock v. Moredock* (U. S. C. C., Pa., 1910) 179 Fed. 163.

⁹ Under different circumstances it may mean a man's household; consisting of himself, his wife, children, and servants (*Huckabee v. Swoope*, 20 Ala. 491), or an entire household, all descended from a common stock, their husbands and wives. *Brett v. Donaghe's Guard.*, 101 Va. 786, 45 S. E. 324, or his wife and children (*Crosgrove v. Crosgrove*, 69 Conn. 416, 38 Atl. 219; *Bowditch v. Andrew*, 8 Allen [Mass.] 339), or, in the absence of wife and children, brothers and sisters, or next of kin (*Smith v. Greeley*, 67 N. H. 377, 30 Atl. 413); *Jacobs v. Prescott*, 102 Me. 63, 65 Atl. 761, or it may be confined to the children who are living at home (*In re Simons' Will*, 55 Conn. 239, 11 Atl. 36).

¹⁰ *Hoadly v. Wood*, 71 Conn. 452, 42 Atl. 263; *Barnes v. Patch*, 8 Ves. 604.

¹¹ *Langmaid v. Hurd*, 64 N. H. 526, 15 Atl. 136.

¹² *Bates v. Dewson*, 128 Mass. 334. See *Townsend v. Townsend*, 156 Mass. 454, 456, 31 N. E. 632.

¹³ *Lambe v. Eames*, L. R. 6 Ch. App. 597.

a devise of both realty and personalty, will receive the same construction as to both kinds of property, unless the context is to the contrary.¹⁴

"Descendants"

This term primarily means issue of every degree, with which word it is substantially synonymous,¹⁵ but it is sometimes restricted to the issue who would take under the law of descent.¹⁶ It will not include collateral relations,¹⁷ in the absence of an intention expressed in the will to extend its meaning.

"Children"—"Grandchildren"

The term "children" is not a technical word, as having any meaning in law which it does not have in popular speech.¹⁸ Its primary meaning its legitimate offspring in the first generation,¹⁹ including those en ventre sa mere.²⁰ And the word "child" may be construed to mean children.²¹ The word children does not include an adopted

¹⁴ *Ridgway v. Munkittrick*, 1 Dru. & War. 84.

¹⁵ *Kingsland v. Rapelye*, 2 Edw. 1; *Haydon v. Willsbere*, 3 Durn. & E. 372; *Davenport v. Hanbury*, 2 Ves. 257; *Lich v. Lich* (1911) 158 Mo. App. 400, 138 S. W. 558.

¹⁶ Thus, where testator devised real estate to his daughter for life, with remainder to her descendants, and she left two sons and three grandchildren, children of one of such sons, the entire estate passed to the sons and the grandchildren took nothing. *Smith v. Thom*, 158 Ky. 655, 166 S. W. 182.

¹⁷ *Baker v. Baker*, 8 Gray (Mass.) 101, 119. See *Woodbridge v. Winslow*, 170 Mass. 388, 49 N. E. 738.

Thus, under a devise to one for life, with remainder "to his descendants, if any, in fee, according to the laws of descent and distribution," the mother and a brother and sister of the life tenant cannot claim the remainder. *Tichenor v. Brewers' Ex'r*, 98 Ky. 349, 33 S. W. 86.

¹⁸ *Duncan v. De Yampert*, 182 Ala. 528, 62 South. 673.

¹⁹ *DUNN v. CORY*, 56 N. J. Eq. 507, 39 Atl. 368, *Dunmore Cas. Wills*, 231; *In re Hunt's Estate*, 133 Pa. 260, 19 Atl. 548, 19 Am. St. Rep. 640; *In re Potter*, 71 Hun, 77, 24 N. Y. Supp. 586; *Brett v. Donaghe's Guard.*, 101 Va. 786, 45 S. E. 324.

²⁰ *Norton v. Mortensen*, 88 Conn. 28, 89 Atl. 882; *McLain v. Howald*, 120 Mich. 274, 79 N. W. 182, 77 Am. St. Rep. 597. The same rule applies to grandchildren as beneficiaries. *Cowles v. Cowles*, 56 Conn. 240, 13 Atl. 414; *Hewitt v. Green* (1910) 77 N. J. Eq. 345, 77 Atl. 25.

The rule by which a child en ventre sa mere is, in law, considered as a child in esse, is not applied in cases where it is detrimental to the child to regard him as born. *Villar v. Gibley*, [1907] A. C. 139, 1 B. R. C. 568; *Armistead v. Dangerfield*, 3 Munf. (Va.) 20, 5 Am. Dec. 501; *McKnight v. Read*, 1 Whart. (Pa.) 213.

²¹ *DUNN v. CORY*, 56 N. J. Eq. 507, 39 Atl. 368, *Dunmore Cas. Wills*, 231, where a devise of \$1,000 to the child of J. was held properly divided among the children of J.

child,²² nor stepchildren,²³ nor grandchildren,²⁴ nor illegitimate children,²⁵ nor a nephew, though he has lived with the testator and has been treated as his son,²⁶ unless the will, read in the light of all the surrounding circumstances, discloses an intention on the part of the testator to use the word in a secondary or more comprehensive sense.²⁷ Where the illegitimate child is not that of the testator,

²² *Russell v. Russell*, 84 Ala. 48, 3 South. 900; *In re Woodcock*, 103 Me. 214, 68 Atl. 821, 125 Am. St. Rep. 291; *Eureka Life Ins. Co. v. Geis*, 121 Md. 196, 88 Atl. 158. This, however, depends on the wording of the statute, and testator's intention to be determined from the circumstances. *Lichter v. Thiers*, 139 Wis. 481, 121 N. W. 153; *In re Truman*, 27 R. I. 209, 61 Atl. 598 (permitting adopted child to take under a bequest to "children or issue").

A devise to testator's "adopted daughter R." vests the estate, although the adoption was invalid. *Brack v. Boyd*, 202 Ill. 440, 66 N. E. 1073.

²³ *Blankenbaker v. Snyder* (Ky.) 36 S. W. 1124; *Kurtz's Estate*, 145 Pa. 637, 23 Atl. 322.

²⁴ *Lamar v. McLaren*, 107 Ga. 591, 34 S. E. 116; *Boston Safe Deposit & Trust Co. v. Nevin*, 212 Mass. 232, 98 N. E. 1051; *Shannon v. Pickell*, 55 Hun, 127, 8 N. Y. Supp. 584; *Yates v. Shern*, 84 Minn. 161, 86 N. W. 1004; *In re Steinmetz's Estate*, 194 Pa. 611, 45 Atl. 663; *Logan v. Brunson*, 56 S. C. 7, 33 S. E. 737; *Brabham v. Crosland*, 25 S. C. 525, 1 S. E. 33; *In re Reynolds' Will*, 20 R. I. 429, 39 Atl. 896; *Tiffany v. Emmet*, 24 R. I. 411, 53 Atl. 281; *Frank v. Frank* (1908) 120 Tenn. 569, 111 S. W. 1119; *In re Scholl's Will*, 100 Wis. 650, 76 N. W. 616.

²⁵ *Hughes v. Knowlton*, 37 Conn. 429; *Gates v. Seibert*, 157 Mo. 254, 57 S. W. 1065, 80 Am. St. Rep. 625; *Collins v. Hoxie*, 9 Paige (N. Y.) 88; *Bealafeld v. Slaughenhaupt*, 213 Pa. 565, 62 Atl. 1113; *Appel v. Byers*, 98 Pa. 479; *Thompson v. McDonald*, 22 N. C. 479; *In re Jeans*, 13 Rep. 627; *In re Scholl*, 100 Wis. 650, 76 N. W. 616. Contra: *Eaton v. Eaton*, 88 Conn. 269, 91 Atl. 191.

²⁶ *Hamlin v. Stevens*, 59 App. Div. 522, 69 N. Y. Supp. 255.

²⁷ Stepchildren: Where a widow with three children married a widower with three, and died, having no issue by her second marriage, and her will gave the residue of her estate "unto the children of my first and second marriage," the "children" of the second marriage were held to mean her stepchildren. *Herrick v. Snyder*, 27 Misc. Rep. 462, 59 N. Y. Supp. 229.

Grandchildren: Where a testator bequeathed certain property to the children of a sister who had been long dead, as had also the last of her children—facts well known to the testator at the time of making the will—it was held that the word "children" referred to the sister's four grandchildren. *In re Schedel's Estate*, 73 Cal. 594, 15 Pac. 297. Accord: *DUNN v. CORY*, 56 N. J. Eq. 507, 39 Atl. 368, *Dunmore Cas. Wills*, 231; *Reeves v. Brymer*, 4 Ves. 692. So "children" may mean grandchildren or great-grandchildren. *Miller v. Carlisle*, 90 Ky. 205, 14 S. W. 75; *Farmers' Trust Co. v. Borden*, 83 N. J. Eq. 222, 89 Atl. 985; *Walker's Estate*, 240 Pa. 1, 87 Atl. 281.

Illegitimate children: Where a devise was made to a daughter, and at her death "to all the children of her body, share and share alike," and the daughter had both legitimate and illegitimate children living—a fact known to the testatrix—the term "children" was held to include both kinds. *Sullivan v. Parker*, 113 N. C. 301, 18 S. E. 347. Semble: *In re Harrison* [1894] 1 Ch. 561;

there is some conflict of opinion as to the effect of legitimation by the subsequent marriage of its parents as bringing it within the scope of the word "children." The conflict is due more to variation in the language of statutes than to anything else and, according to the view which generally prevails, legitimation enables a child born out of wedlock to take.²⁸ So the context may show that the word is used as meaning "heirs"²⁹ or "descendants."³⁰ And a remainder over to B.'s children, "if he marries and leaves children by his wife," does not refer to the children of B.'s divorced wife, who has remarried—facts happening before the making of the will, and known to the testator.³¹ The word, when used in its primary sense, is one of purchase, and not of limitation.³² But when qualified by the words "or other lineal descendants,"³³ or when shown to be used as meaning "heirs,"³⁴ it becomes a word of limitation.

Dickison v. Dickison, 36 Ill. App. 503. So, where there is a gift to the children of a deceased person, and there are one legitimate and one or more illegitimate children, all will take, if the testator was aware of all the facts. *Gill v. Shelley*, 2 R. & My. 336; *Leigh v. Byron*, 1 Sm. & G. 486; *Tugwell v. Scott*, 24 Beav. 141. Even where the gift is to the children of a living person, the context may be strong enough to show that particular illegitimate children were intended to take, as in the case of a gift to the children of A. "now living," and A. had at the date of the will none but illegitimate children. *Dover v. Alexander*, 2 Hare, 282. Accord: *Tuttle v. Woolworth*, 74 N. J. Eq. 310, 77 Atl. 684. Where a testator, 14 years before his death, abandoned his wife and two children in England, of whom one child only survived him, and in the lifetime of his wife married a woman in America, who was ignorant of these facts, and by whom he had four children, a devise for the benefit of the testator's children will be presumed to have been intended only for the issue of the later marriage. *Elliott v. Elliott*, 117 Ind. 380, 20 N. E. 264, 10 Am. St. Rep. 54.

²⁸ *Gates v. Seibert*, 157 Mo. 254, 57 S. W. 1065, 80 Am. St. Rep. 625; *Smith v. Lansing*, 24 Misc. Rep. 566, 53 N. Y. Supp. 633, construing Laws N. Y. 1896, p. 219, c. 272, § 18. Contra: *Hicks v. Smith*, 94 Ga. 809, 22 S. E. 153, construing Code Ga. 1882, § 1787.

Where the child made legitimate by marriage is that of testator, he takes under a bequest "to my children, share and share alike." *Morton v. Morton*, 62 Neb. 420, 87 N. W. 182.

²⁹ *Smith v. Fox's Adm'r*, 82 Va. 763, 1 S. E. 200.

³⁰ *In re Scholl's Will*, 100 Wis. 650, 76 N. W. 616.

³¹ *Stuart v. Brown*, 11 App. Div. 492, 42 N. Y. Supp. 365.

³² *Bohner v. Bonner*, 28 Ind. App. 147, 62 N. E. 497; *Mefford v. Dougherty*, 89 Ky. 58, 11 S. W. 716, 25 Am. St. Rep. 521; *Manning v. Bader*, 224 Pa. 575, 73 Atl. 939; *In re McIntosh's Estate*, 158 Pa. 528, 27 Atl. 1044, 1047, 1048; *Jones v. Cable*, 114 Pa. 586, 7 Atl. 791; *Affolter v. May*, 115 Pa. 54, 8 Atl. 20; *Forest Oil Co. v. Crawford*, 23 C. C. A. 55, 77 Fed. 106.

³³ *Mason v. Ammon*, 117 Pa. 127, 11 Atl. 449.

³⁴ *Cook v. Councilman*, 109 Md. 622, 72 Atl. 404.

The rules above stated apply, in general, to grandchildren as beneficiaries. A gift to grandchildren does not include great-grandchildren,³⁵ in the absence of a manifest intention to the contrary.³⁶

"Brothers and Sisters"

These terms are construed as including those of the half as well as of the whole blood.³⁷

"Nephews and Nieces"

A gift to nephews or nieces does not include great-nephews or great-nieces,³⁸ unless such is plainly the intent of the testator;³⁹ neither do bequests to great-nephews and great-nieces include nephews and nieces.⁴⁰ Prima facie, a gift to nieces does not include an adopted daughter of a deceased brother.⁴¹ Where the testator never had any brothers or sisters, a bequest to his nephews and nieces will be construed as referring to those of his wife;⁴² and the will may disclose such an intent, though the testator had relatives of this description of his own.⁴³ A devise to "spinster or unmarried nieces" includes widows as well as maidens,⁴⁴ and a gift to nephews or nieces includes children of a half brother or sister.⁴⁵ A devise to "nephews and nieces living at my decease" does not include the

³⁵ *Smith v. Lansing*, 24 Misc. Rep. 566, 53 N. Y. Supp. 633; *Thomas v. Thomas* (1910) 97 Miss. 697, 53 South. 630; *Lord Orford v. Churchill*, 3 V. & B. 59.

³⁶ *In re Morton's Estate*, 26 Pittsb. Leg. J. N. S. (Pa.) 403.

³⁷ *Yetter's Estate*, 160 Pa. 506, 28 Atl. 847; *Grieves v. Rawley*, 10 Hare, 63; *Shull v. Johnson*, 55 N. C. 202; *Luce v. Harris*, 79 Pa. 432; *Watkins v. Blount*, 43 Tex. Civ. App. 460, 94 S. W. 1116.

³⁸ *Lewis v. Fisher*, 2 Yeates (Pa.) 196; *White v. Old*, 113 Va. 709, 75 S. E. 182; *Shelley v. Bryer*, Jac. 207; *Crook v. Whitley*, 7 D. M. G. 490. *Semble*: *In re Harrison's Estate*, 202 Pa. 331, 51 Atl. 976.

A stepdaughter of a brother of testatrix is not entitled to take under a bequest to "my nieces." *In re Holt's Estate*, 146 Cal. 77, 79 Pac. 585.

³⁹ *Peard v. Vose*, 19 R. I. 654, 35 Atl. 1046 (where there were no nieces, but grandnieces, living—facts known to the testator); *Shepard v. Shepard*, 57 Conn. 24, 17 Atl. 173 (where there was a bequest "to any nephew or niece who desires," etc., and the testator had manifestly used the terms as applying to great nephews and nieces in other parts of the will). See, also, *James v. Smith*, 14 Sim. 214; *Weeds v. Bristow*, L. R. 2 Eq. 333, and *Leask v. Richards*, 116 App. Div. 274, 101 N. Y. Supp. 652, affirmed 188 N. Y. 291, 80 N. E. 919.

⁴⁰ *Kimball v. Chappel*, 18 N. Y. Supp. 30, 27 Abb. N. C. 437.

⁴¹ *In re Haight*, 63 Misc. Rep. 624, 118 N. Y. Supp. 745.

⁴² *Hogg v. Cook*, 32 Beav. 641.

⁴³ *In re Gue*, 61 Law J. Ch. 510. Unless this intent appears, the words do not include nephews or nieces by marriage. *Green's Appeal*, 42 Pa. 30; *In re Butler*, 66 Misc. Rep. 406, 123 N. Y. Supp. 282.

⁴⁴ *In re Conway's Estate*, 181 Pa. 156, 37 Atl. 204.

⁴⁵ *Grieves v. Rawley*, 10 Hare, 63.

wives and widows of the testator's nephews.⁴⁶ A bequest to all the testator's nephews and nieces, enumerating them, excludes nephews and nieces elsewhere provided for in the will, and not included in the enumeration.⁴⁷ But nephews to whom other legacies have been given are included in a bequest to each of the testator's nephews.⁴⁸ Unless aided by the context, a gift to nephews or nieces does not include illegitimates.⁴⁹

"Cousins"

A gift to cousins *prima facie* means only first cousins,⁵⁰ and a bequest to first cousins does not include first cousins once removed,⁵¹ unless they are specifically referred to as such;⁵² neither does a first cousin once removed take under a gift to second cousins.⁵³ But a gift to "all the first and second cousins" of a person is construed as including all cousins within the degree of second cousins, comprehending, therefore, cousins once and twice removed.⁵⁴ The term means legitimate cousins, unless the testator's intent to the contrary clearly appears.⁵⁵

"Relations"—"Relatives"

Prima facie, these terms apply to no one not akin to the testator by blood. Consequently relations by marriage are not included in a bequest to relations generally.⁵⁶ Unless a contrary intention appear, the term is interpreted, as meaning the persons who would be entitled, under the statute of distributions, either as next of kin, or by representation to next of kin.⁵⁷ A gift to "near relations" is

⁴⁶ *Goddard v. Amory*, 147 Mass. 71, 16 N. E. 725.

⁴⁷ *Wildberger v. Cheek's Ex'rs*, 94 Va. 517, 27 S. E. 441. *Semble*: *In re Woodward*, 117 N. Y. 522, 23 N. E. 120, 7 L. R. A. 367.

⁴⁸ *Bartlett v. Houdlette*, 147 Mass. 25, 16 N. E. 740.

⁴⁹ *Lyon v. Lyon*, 88 Me. 395, 34 Atl. 180; *In re Fish*, [1894] 2 Ch. 83.

⁵⁰ *Stoddard v. Nelson*, 6 D. M. G. 68; *Stevenson v. Abingdon*, 31 Beav. 305.

⁵¹ *Sanderson v. Bayley*, 4 My. & Cr. 56 (i. e., the child of the testator's cousin. *In re Parker*, 15 Ch. Div. 528).

⁵² *Wilkes v. Bannister*, 30 Ch. Div. 512.

⁵³ *Corporation, etc., v. Collins*, 15 Sim. 541; *Bentham v. Wilson*, 15 Ch. Div. 528.

⁵⁴ *Mayott v. Mayott*, 2 Bro. C. C. 125; *Simcox v. Bell*, 1 Sim. & Stu. 301; *Charge v. Goodyear*, 3 Russ. 140. *Semble*: *In re Bonner*, 19 Ch. Div. 201.

⁵⁵ *In re Jodrell*, L. R. 44, Ch. D. 590.

⁵⁶ *Boyd v. Perkins* (1908) 130 Ky. 77, 113 S. W. 95. A wife cannot, therefore, claim under a bequest to her husband's relations, nor a husband as a relation of his wife. See *Esty v. Clark*, 101 Mass. 36, 3 Am. Rep. 320; *Kimball v. Story*, 108 Mass. 382; *Keniston v. Mayhew*, 169 Mass. 167, 169, 47 N. E. 612; *Worsely v. Johnson*, 3 Atk. 758.

⁵⁷ *Thompson v. Thornton* (1908) 197 Mass. 273, 83 N. E. 880; *Drew v. Wakefield*, 54 Me. 298; *Varrell v. Wendell*, 20 N. H. 435; *McNeillidge v. Galbraith*, 8 Serg. & R. (Pa.) 45, 11 Am. Dec. 572; *Rayner v. Mowbray*, 3 Bro. C.

equivalent to relations in general,⁵⁸ but a gift to nearest relations applies to the nearest of kin, and excludes such as might take by representation under the statute of distributions.⁵⁹ But a reference to relatives "hereinbefore named" includes therein illegitimate relatives mentioned before,⁶⁰ and a bequest to "nearest blood relatives," when testator knew he had no blood relatives other than illegitimates, includes such persons,⁶¹ though, in the absence of a manifest intent to the contrary, the term refers to legitimate relatives.

"Servants"

The term means ordinarily those who are employed in the domestic service of the testator at a regular stipend, and who pass their entire time in the service of their master;⁶² but the context may show an intent to use the term as including servants of all classes, whether domestic or not.⁶³ An unqualified bequest to one's servants would naturally refer to those in the testator's service at the time of his death,⁶⁴ though such a gift has been said to operate in favor of such as were in service at the time of making the will.⁶⁵

"Husband and Wife"

A bequest to the wife of a person, without mentioning her name, applies exclusively to the individual who answers the description at the date of the will, and is not to be extended to an after-taken

C. 234; Doe dem. Thwartes v. Over, 1 Taunt. 263. So a bequest to "poor relatives" includes only such as would be heirs at law in case of intestacy. Ross v. Ross, 25 Can. S. C. R. 307.

⁵⁸ Whitehorne v. Harris, 2 Ves. 527 (i. e., next of kin, according to the statute of distributions); Handley v. Wrightson, 60 Md. 198.

⁵⁹ Locke v. Locke, 45 N. J. Eq. 97, 16 Atl. 49 (holding that this expression means brothers, to the exclusion of nephews and nieces); Ennis v. Pentz, 3 Bradf. Sur. (N. Y.) 385; In re Altdorfer's Estate, 225 Pa. 136, 73 Atl. 1068; Smith v. Campbell, 19 Ves. 400.

But a sister-in-law, enumerated among "nearest relations" in specific bequests to such relations, is entitled to share under a subsequent clause dividing the balance equally "among the nearest relations," but not enumerating them. Hall v. Wiggin, 67 N. H. 89, 29 Atl. 671.

⁶⁰ Seale-Hayne v. Jodrell, [1891] App. Cas. 304.

⁶¹ In re Sander's Estate, 126 Wis. 660, 105 N. W. 1064, 5 Ann. Cas. 508.

⁶² Townshend v. Windham, 2 Vern. 546; Frazer v. Weld, 177 Mass. 513, 59 N. E. 118.

Hence a person coming in to assist with the household work a day or two each week does not come within the terms of a bequest to "such servants as shall be in my employ at the time of my death." Metcalf v. Sweeney, 17 R. I. 213, 21 Atl. 364, 33 Am. St. Rep. 864.

⁶³ Ginter's Ex'rs v. Shelton, 102 Va. 185, 45 S. E. 892 (where factory hands were included in a gift to servants).

⁶⁴ 1 Redf. Wills, 96; 2 Wms. Ex'rs, 1150.

⁶⁵ Parker v. Marchant, 1 Y. & C. C. O. 290.

wife,⁶⁶ even though there be a divorce and remarriage subsequent to the making of the will,⁶⁷ unless the context shows an intent to the contrary.⁶⁸ Where legacy is to one referred to as wife and also mentioned by name, in the event of a subsequent divorce, the word "wife" is usually treated as descriptive only, and she is entitled to take.⁶⁹ A gift to the testator's wife, expressly stated to be in conformity to a marriage settlement, does not make her a legatee, within the provisions of the residuary clause giving the remainder of the estate to prior legatees in proportion to their legacies.⁷⁰ While a gift to the husband or wife primarily refers to a person bearing a lawful relation to the testator, yet if, in view of all the circumstances, the latter plainly refers to one who has fulfilled the matrimonial function without the sanction of the law, such person will take under the designation of wife.⁷¹

"Corporations"

Errors and inaccuracies in the description of beneficiaries occur most frequently in devises and bequests to religious and charitable corporations. Here, as elsewhere, if, in view of all the circumstances, there is no reasonable doubt as to the beneficiary intended, the error will not affect the bequest. Thus a bequest to the Second Congregational Church is payable to the Second Congregational Society, in view of the inability of the unincorporated church to hold land;⁷² and the "New York Society for the Relief of the Ruptured and Crippled in the City of New York" is sufficiently de-

⁶⁶ *Beers v. Narramore*, 61 Conn. 13, 22 Atl. 1061; *Meeker v. Draffen*, 137 App. Div. 537, 121 N. Y. Supp. 1051; *Van Syckel v. Van Syckel*, 51 N. J. Eq. 194, 26 Atl. 156.

⁶⁷ *Davis v. Kerr*, 3 App. Div. 322, 38 N. Y. Supp. 387.

⁶⁸ *Cogan v. McCabe*, 23 Misc. Rep. 739, 52 N. Y. Supp. 48 (where the income of a fund was to be applied to the support of the wife and children of the testator's son H. until the youngest child reached the age of twenty-one. The wife of the son, when the will was made, died. Held, that the second wife and her children would take as legatees); *Drew v. Drew*, 68 Law J. Ch. 157, [1899] 1 Ch. 336, 79 Law T. (N. S.) 656.

⁶⁹ *In re Brown's Estate* (1908) 139 Iowa, 219, 117 N. W. 260; *IN RE JONES' ESTATE*, 211 Pa. 364, 60 Atl. 915, 69 L. R. A. 940, 107 Am. St. Rep. 581, 3 App. Cas. 221, *Dunmore Cas. Wills*, 154. Compare *Collard v. Collard* (N. J. Prerog.) 67 Atl. 190; *Bell v. Smalley*, 45 N. J. Eq. 478, 18 Atl. 70.

⁷⁰ *In re Pentz's Estate*, 200 Pa. 2, 49 Atl. 361.

⁷¹ *Pastene v. Bonini*, 166 Mass. 85, 44 N. E. 246; *Dicke v. Wagner*, 95 Wis. 260, 70 N. W. 159.

A gift to a betrothed named as wife has been held to be void, no marriage having taken place during lifetime of testator. *Steen v. Steen*, 68 N. J. Eq. 472, 59 Atl. 675. Compare *Schloss v. Stiebel*, 9 Eng. Ch. (6 Sim.) 1.

⁷² *Crosgrove v. Crosgrove*, 69 Conn. 416, 38 Atl. 219.

scribed in a devise to the "Society for the Relief of the Ruptured and Crippled of New York City."⁷³

"Next of Kin"

Frequently testators dispose of property to the next of kin, according to the laws of the state or the statute of distributions.⁷⁴ Here the term has its statutory technical meaning. Otherwise, a gift to next of kin, whether of the testator or another person, means the nearest blood relations in equal degree to the testator or such other.⁷⁵ Thus a brother or sister takes as next of kin, to the exclusion of the children of a deceased brother or sister.⁷⁶ The word "kind" may be construed to mean "kin,"⁷⁷ and in a gift of realty and personalty to the "heirs or legal representatives" of a deceased legatee, the latter expression may be interpreted as next of kin.⁷⁸

"Personal Representatives"

A bequest to the representatives or legal or personal representatives of any one means prima facie his executors or administra-

⁷³ Weed v. Scofield, 73 Conn. 670, 49 Atl. 22.

See, also, Kerrigan v. Conelly (N. J. Ch.) 46 Atl. 227; Van Nostrand v. Board, 59 N. J. Eq. 19, 44 Atl. 472; Reilly v. Infirmary, 87 Md. 664, 40 Atl. 894; Woman's Foreign Missionary Soc. of M. E. Church v. Mitchell, 93 Md. 199, 48 Atl. 737, 53 L. R. A. 711 (holding that a legacy to the "Board of Managers of the Foreign Missionary Society of the Methodist Episcopal Church" will not be defeated because there was no organization of that name, but would go to the Woman's Foreign Missionary Society of the Methodist Episcopal Church); Walter v. Walter, 60 Misc. Rep. 383, 113 N. Y. Supp. 465 (where bequest to "Art Museum of City of San Francisco" was allowed to pass to San Francisco Art Association).

Transposition in the words of the description may be resorted to, to effect the intention of the testator. Hull v. Pearson, 36 App. Div. 224, 55 N. Y. Supp. 324.

⁷⁴ Duffy v. Hargan, 62 N. J. Eq. 588, 50 Atl. 678; In re Devoe, 171 N. Y. 281, 63 N. E. 1102, 57 L. R. A. 536; Tiffany v. Emmet, 24 R. I. 411, 53 Atl. 281.

A gift to such persons as would be the testator's heirs under the statute of distribution will be construed to mean the testator's next of kin. Fisk v. Fisk, 60 N. J. Eq. 195, 46 Atl. 538.

⁷⁵ Graham v. Whitridge, 99 Md. 248, 57 Atl. 609, 58 Atl. 36, 66 L. R. A. 408; Keniston v. Mayhew, 169 Mass. 166, 47 N. E. 612; Welsh v. Crater, 32 N. J. Eq. 177; Harrison v. Ward, 58 N. C. 240; Redmond v. Burroughs, 63 N. C. 245; Elmesley v. Young, 2 My. & K. 780; Withy v. Mangles, 4 B. 358, 10 Cl. & F. 215.

A widow therefore ordinarily cannot take under a devise to the "next of kin" of her husband, Haraden v. Larrabee, 113 Mass. 430; or a husband where devise is to "next of kin" of wife, Wetter v. Walker, 62 Ga. 142.

⁷⁶ Clark v. Mack (1910) 161 Mich. 545, 126 N. W. 632.

⁷⁷ Lusby v. Cobb, 80 Miss. 715, 32 South. 6.

⁷⁸ Howell v. Gifford, 64 N. J. Eq. 180, 53 Atl. 1074.

tors.⁷⁹ But the rule readily gives way to the testator's intention, according to which the terms may mean next of kin,⁸⁰ distributees under the statute of distributions,⁸¹ heirs,⁸² children or lineal descendants,⁸³ or guardian.⁸⁴ A gift to an executor by name is a gift to him personally;⁸⁵ the word "executor" being merely descriptive of the beneficiary,⁸⁶ and so, also, is a bequest "to each of my executors," naming the amount.⁸⁷ In a gift to a person and his "legal representatives," the words "legal representatives" are words of limitation and not of purchase.⁸⁸

"Issue"

This is a term of large significance, and *prima facie* includes descendants of every degree.⁸⁹ But the rule readily yields to indications of a contrary intention, and a strong tendency is manifested

⁷⁹ *Connecticut Trust & Safe Deposit Co. v. Hollister*, 74 Conn. 228, 50 Atl. 750; *Alexander v. McPeck*, 189 Mass. 34, 75 N. E. 88; *Cox v. Curwen*, 118 Mass. 198; *Halsey v. Paterson*, 37 N. J. Eq. 445; *Lyon v. Fidelity Bank*, 128 N. C. 75, 38 S. E. 251; *In re Ware*, 45 Ch. Div. 269; *King v. Cleaveland*, 4 De G. & J. 477.

⁸⁰ *Davies v. Davies*, 55 Conn. 319, 11 Atl. 500 (where a remainder was given to the personal representatives of the beneficiary for life, who would be entitled to his personal estate according to law); *Howell v. Westbrook*, 69 N. J. Eq. 641, 66 Atl. 417.

⁸¹ *Greene v. Huntington*, 73 Conn. 106, 46 Atl. 883; *In re Bates*, 159 Mass. 252, 34 N. E. 266; *Casey v. Lockwood*, 24 R. I. 72, 52 Atl. 803.

⁸² *Hartford Trust Co. v. Wolcott* (1912) 85 Conn. 134, 81 Atl. 1057; *Thayer v. Pressey*, 175 Mass. 225, 236, 56 N. E. 5; *Lodge v. Weld*, 139 Mass. 499, 504, 2 N. E. 95; *Olney v. Lovering*, 167 Mass. 446, 448, 45 N. E. 766; *Chasy v. Gowdy*, 43 N. J. Eq. 95, 9 Atl. 580.

⁸³ *Miller v. Metcalf*, 77 Conn. 176, 58 Atl. 743.

⁸⁴ *Livermore v. Somers* (N. J. Ch.) 16 Atl. 513 (when the bequest was to an infant legatee, "or his legal representatives").

⁸⁵ *In re Hollohan's Will*, 52 Hun, 614, 5 N. Y. Supp. 342.

⁸⁶ *Figueira v. Taafe*, 6 Dem. Sur. (N. Y.) 166.

⁸⁷ *Halsey v. Convention of Protestant Episcopal Church*, 75 Md. 275, 23 Atl. 781.

⁸⁸ *Williams v. Knight*, 18 R. I. 333, 27 Atl. 210; *Appleton v. Rowley*, L. R. 8 Eq. 139.

⁸⁹ *Bartlett v. Sears*, 81 Conn. 34, 70 Atl. 33; *Union Safe Deposit & Trust Co. v. Dudley*, 104 Me. 297, 72 Atl. 166; *Jackson v. Jackson*, 153 Mass. 374, 26 N. E. 1112, 11 L. R. A. 305, 25 Am. St. Rep. 643; *King v. Savage*, 121 Mass. 303; *Houghton v. Kendall*, 7 Allen (Mass.) 72, 76; *United States Trust Co. v. Tobias*, 21 Abb. N. C. 392, 4 N. Y. Supp. 211; *Wilson v. Wilson*, 76 App. Div. 232, 78 N. Y. Supp. 408; *Harrison v. McAdam*, 38 Misc. Rep. 18, 76 N. Y. Supp. 701; *Morrow v. McMahon*, 35 Misc. Rep. 348, 71 N. Y. Supp. 961; *SOPER v. BROWN*, 136 N. Y. 244, 32 N. E. 768, 32 Am. St. Rep. 731, *Dunmore Cas. Wills*, 235; *Hartwell v. Tefft*, 19 R. I. 644, 35 Atl. 882, 34 L. R. A. 500; *Pearce v. Rickard*, 18 R. I. 142, 26 Atl. 38, 19 L. R. A. 472, 49 Am. St. Rep. 755; *Davenport v. Hanbury*, 3 Ves. 258; *Holgen v. Neale*, L. R. 11 Eq. 48.

in many cases to confine it to children of the person whose issue are referred to.⁹⁰ Where the "parent" of issue is spoken of, the word is *prima facie* restricted to children of the parent.⁹¹ In the light of the testator's intent, the term may mean heirs at law,⁹² or issue living at a particular time,⁹³ or the issue of a particular wife.⁹⁴ Adopted children are not generally permitted to take under the term "issue,"⁹⁵ although much depends upon the language of the statutes defining their status, and the language of the particular will. Whatever be its interpretation, "issue" means *prima facie* legitimate is-

⁹⁰ Thus it has been held that where a will devises certain property to the "lawful issue" of a son of the testatrix, the term includes his children only, and not their children. *Wright v. Mercen*, 84 Misc. Rep. 414, 69 N. Y. Supp. 936. Accord: *Emmet v. Emmet*, 67 App. Div. 183, 73 N. Y. Supp. 614. See, on the same point, *Jackson v. Jackson*, 153 Mass. 374, 26 N. E. 1112, 11 L. R. A. 305, 25 Am. St. Rep. 643; *Chwatal v. Schreiner*, 148 N. Y. 683, 43 N. E. 166; *Hills v. Barnard*, 152 Mass. 67, 25 N. E. 96, 9 L. R. A. 211; *Coyle v. Coyle*, 73 N. J. Eq. 528, 68 Atl. 224.

So where, in a number of instances in the will, the term "issue" has been manifestly limited to children, it will be given the same meaning in another clause containing nothing by way of limitation (*In re Birks*, 69 Law J. Ch. 124 [1900] 1 Ch. 417, 81 Law T. [N. S.] 741), though there is no imperative rule of construction that requires this. *In re Birks*, 68 Law J. Ch. 319, [1899] 1 Ch. 703, 80 Law T. (N. S.) 257.

So the term may be limited to immediate offspring by its association with the words "child or children" in the will, *Arnold v. Alden*, 173 Ill. 229, 50 N. E. 704; *Guy v. Osborne*, 91 S. C. 291, 74 S. E. 617; or because testator uses the words "children" and "issue" interchangeably, *In re Duckett's Estate*, 214 Pa. 362, 63 Atl. 830. For further instances in which the word is thus limited, see *Daly v. Greenberg*, 69 Hun, 228, 23 N. Y. Supp. 582; *Nes v. Ramsay*, 155 Pa. 628, 26 Atl. 770; *Palmer v. Dunham*, 125 N. Y. 68, 25 N. E. 1081; *Parkhurst v. Harrower*, 142 Pa. 432, 21 Atl. 826, 24 Am. St. Rep. 507; *Thomas v. Levering*, 73 Md. 451, 21 Atl. 367, 23 Atl. 3. All these cases hinge on the particular language of each will, and no controlling principle is disclosed, probably none exists.

⁹¹ *Barstow v. Goodwin*, 2 Bradf. Sur. (N. Y.) 416; *Murray v. Bronson*, 1 Dem. Sur. (N. Y.) 217; *Pruen v. Osborne*, 11 Sim. 132; *Maynard v. Wright*, 26 B. 285; *Brisbin v. Huntington*, 128 Iowa, 166, 103 N. W. 144, 5 Ann. Cas. 931.

Where the gift is "to the issue of A. then living, and the child or children of such of them as shall then be dead," issue means children. *Fairchild v. Bushnell*, 32 Beav. 158.

⁹² *Miller v. Miller*, 151 Ky. 563, 152 S. W. 542; *Chwatal v. Schreiner*, 3 Misc. Rep. 192, 23 N. Y. Supp. 206.

⁹³ *Jackson v. Jackson*, 153 Mass. 374, 26 N. E. 1112, 11 L. R. A. 305, 25 Am. St. Rep. 643; *McGillis v. McGillis*, 11 App. Div. 359, 42 N. Y. Supp. 921.

⁹⁴ *In re Green*, 131 N. Y. 586, 30 N. E. 64, affirming 60 Hun, 510, 15 N. Y. Supp. 240, without opinion.

⁹⁵ *New York Life Ins. & Trust Co. v. Viele*, 161 N. Y. 11, 55 N. E. 311, 76 Am. St. Rep. 238; *Jenkins v. Jenkins*, 64 N. H. 407, 14 Atl. 557.

Contra: *Hartwell v. Tefft*, 19 R. I. 644, 35 Atl. 882, 34 L. R. A. 500.

sue,⁹⁶ and an intention to include illegitimate issue must appear upon the face of the will itself, without the help of extrinsic evidence.⁹⁷

"Heirs"

This term, when used in a will, has, *prima facie*, the common-law meaning of right heirs; i. e., they who would by law succeed to the real estate of the person named if he died intestate.⁹⁸ Several persons may take under a gift "to my heir," it being immaterial which number is used.⁹⁹ Where the statute makes part of intestate land descend to the surviving spouse, such spouse is thereby made an heir and should be entitled to take under a gift to the heirs of the other. The right of husband or wife to take under the designation depends therefore largely upon the wording of the statute.¹

But here, as elsewhere, the force of the word may be controlled by the context;² and the intention of the testator, clearly manifested, may give the term a meaning widely different from its common-law significance. Thus it very frequently is construed as meaning children,³ as where the gift is to "children or heirs,"⁴ or

⁹⁶ *Brisbin v. Huntington*, 128 Iowa, 166, 103 N. W. 144, 5 Ann. Cas. 931; *Olmsted v. Olmsted*, 190 N. Y. 458, 83 N. E. 569, 128 Am. St. Rep. 585.

⁹⁷ *Flora v. Anderson* (C. C.) 67 Fed. 182.

⁹⁸ *Ruggles v. Randall*, 70 Conn. 44, 38 Atl. 835; *Mason v. Bally*, 6 Del. Ch. 129, 14 Atl. 309; *Durbin v. Redman*, 140 Ind. 694, 40 N. E. 133; *Wedekind v. Hallenberg*, 88 Ky. 114, 10 S. W. 368; *Adams v. Jones*, 176 Mass. 185, 57 N. E. 362; *Olney v. Lovering*, 167 Mass. 446, 45 N. E. 766; *Howell v. Gifford*, 64 N. J. Eq. 180, 53 Atl. 1074; *Baer v. Forbes*, 48 W. Va. 208, 36 S. E. 364; *Johnson v. Brasington*, 156 N. Y. 181, 50 N. E. 859; *In re McCrea's Estate*, 180 Pa. 81, 36 Atl. 412; *FORREST v. PORCH*, 100 Tenn. 391, 45 S. W. 676, *Dunmore Cas. Wills*, 239; *Allison v. Allison's Ex'rs*, 101 Va. 537, 44 S. E. 904, 63 L. R. A. 920; *Flint v. Wisconsin Trust Co.*, 151 Wis. 231, 138 N. W. 629, *Ann. Cas.* 1914B, 67.

⁹⁹ *Mounsey v. Blamire*, 4 Russell (4 Eng. Ch.) 384.

¹ For cases allowing spouse to take, see *Peabody v. Cook*, 201 Mass. 218, 87 N. E. 466, 16 Ann. Cas. 296; *Turner v. Burr*, 141 Mich. 106, 104 N. W. 379; *Lincoln v. Perry*, 149 Mass. 368, 21 N. E. 671, 4 L. R. A. 215; *In re Boyd's Estate*, 199 Pa. 497, 49 Atl. 299 (holding the husband to take as heir of the wife, the latter case confining his interest as heir to the personalty); *Lawrence v. Crane*, 158 Mass. 392, 33 N. E. 605. For cases denying right of spouse to take, see *Hanvy v. Moore*, 140 Ga. 691, 79 S. E. 772; *Black v. Jones*, 264 Ill. 548, 106 N. E. 462, *Ann. Cas.* 1915D, 1173; *Platt v. Mickle*, 137 N. Y. 106, 32 N. E. 1070; *Snider v. Snider*, 11 App. Div. 171, 42 N. Y. Supp. 613; *In re Raleigh's Estate*, 206 Pa. 451, 55 Atl. 1119; *Peet v. Railway Co.*, 70 Tex. 522, 8 S. W. 203.

² *Griffin v. Ulen*, 139 Ind. 565, 39 N. E. 254.

³ *Bradsby v. Wallace* (1903) 202 Ill. 239, 66 N. E. 1088; *Kalbach v. Clark*, 133 Iowa, 215, 110 N. W. 599, 12 L. R. A. (N. S.) 801, 12 Ann. Cas. 647; *Wat-*

⁴ *Johnson v. Brasington*, 86 Hun, 106, 34 N. Y. Supp. 200.

where in other portions of the will the term is obviously used as referring to children,⁵ or where, upon the death of the tenant for life, the property was "to descend immediately to her heirs";⁶ and this is the usual interpretation placed upon the word when there is a limitation over, upon a certain person's dying without heirs.⁷ The context may also show that the term is used as meaning issue,⁸ or heirs of the body,⁹ or legatees previously mentioned in the will,¹⁰ though in this sense it does not include corporate legatees,¹¹ or next of kin,¹² or heir apparent,¹³ or the children of a particular marriage.¹⁴ While the word primarily refers to persons legitimately

son v. Williamson, 129 Ala. 362, 30 South. 281; Barton v. Tuttle, 62 N. H. 558; Moore v. Lewis, 4 Ohio Cir. Ct. R. 284; Ballentine v. Wood, 42 N. J. Eq. 552, 9 Atl. 582; Wettach v. Horn, 201 Pa. 201, 50 Atl. 1001 (where the residue was bequeathed to the natural daughter of a deceased sister of the testator, and "her heirs," the latter term being held to mean children); Commonwealth v. Wellford, 114 Va. 372, 76 S. E. 917 (where devise was to heirs of testator's living brothers).

⁵ Stewart v. Powers, 9 Ohio Cir. Ct. R. 143; Lott v. Thompson, 36 S. C. 38, 15 S. E. 278. Semble: Lockman v. Hobbs, 98 N. C. 541, 4 S. E. 627; In re Hunt's Estate, 133 Pa. 260, 19 Atl. 548, 19 Am. St. Rep. 640.

⁶ Hughes v. Clark (Ky.) 26 S. W. 187.

⁷ Anthony v. Anthony, 55 Conn. 256, 11 Atl. 45; Baxter v. Winn, 87 Ga. 239, 13 S. E. 634; Fishback v. Joesting, 183 Ill. 463, 56 N. E. 62; Underwood v. Robbins, 117 Ind. 308, 20 N. E. 230; Benson v. Linthicum, 75 Md. 141, 23 Atl. 133; Boyd v. Robinson, 93 Tenn. 1, 23 S. W. 72; Franklin v. Franklin, 91 Tenn. 119, 18 S. W. 61.

⁸ Harkleroad v. Bass, 84 Miss. 483, 36 South. 537; Brown v. Tuschoff, 235 Mo. 449, 138 S. W. 497; Schwencke v. Haffner, 22 Misc. Rep. 293, 50 N. Y. Supp. 165 (where the will provided that "upon the death of my wife, if she should die without having again remarried, then my said real and personal estate shall be equally divided, share and share alike, between my wife's children and my children then living or their heirs"); Canfield v. Fallon, 26 Misc. Rep. 345, 57 N. Y. Supp. 149; Francks v. Whitaker, 116 N. C. 518, 21 S. E. 175; Rollins v. Keel, 115 N. C. 68, 20 S. E. 209 (where testator devised lands to his only son, and over, in case of his death "without any lawful heirs"); Myrick v. Heard (C. C.) 31 Fed. 241; McMillan v. McMillan, 27 Ont. App. 209.

⁹ Dengel v. Brown, 1 App. D. C. 423; Lancaster v. Lancaster, 187 Ill. 540, 58 N. E. 462, 79 Am. St. Rep. 234; Snider v. Snider, 160 N. Y. 151, 54 N. E. 676.

¹⁰ Kenan v. Graham, 135 Ala. 585, 33 South. 699; Graham v. De Yampert, 106 Ala. 279, 17 South. 355; Plummer v. Shepherd, 94 Md. 466, 51 Atl. 173; In re Hull's Will, 30 Misc. Rep. 281, 63 N. Y. Supp. 725.

¹¹ Id.

¹² Dickerman v. Alling, 83 Conn. 342, 76 Atl. 362; In re Nelson's Estate (1909) 9 Del. Ch. 1, 74 Atl. 851; Howell v. Ackerman, 89 Ky. 22, 11 S. W. 819; Hardy v. Gage, 66 N. H. 552, 22 Atl. 557; Dukes v. Faulk, 37 S. C. 255, 16 S. E. 122, 34 Am. St. Rep. 745.

¹³ Barber v. Railroad Co., 166 U. S. 83, 17 Sup. Ct. 488, 41 L. Ed. 925.

¹⁴ Weller v. Weller, 22 Tex. Civ. App. 247, 54 S. W. 652. Here a testator, who had children by two marriages, stated in his will that he had given to

born, yet it will commonly include illegitimate children who are made, by statute, heirs of the person whose heirs are referred to in the will.¹⁵ Whether an adopted child, particularly of another than the testator, will take under the term "heirs" of such person, depends largely upon the statutes relating to adopted children. In the greater number of decided cases, an adopted child has not been permitted to take under the designation "heirs,"¹⁶ but where an adopted child has been placed by statute on an equality with children by birth for the purpose of inheriting, he should be permitted to take under a devise to "heirs."¹⁷

A reference in a will to an "adopted daughter" will not enable such person to take under a residuary clause "to such persons as would succeed and inherit in case of intestacy," in the absence of a statutory adoption;¹⁸ and an adoption set aside by the adopting father and mother will not enable the child to take under a subsequent will of the father giving the residue to his "lawful heirs," whether the revocation of the adoption was valid or not.¹⁹

A limitation over to heirs is interpreted as referring to the heirs of the testator when the testator's intent to the contrary does not appear.²⁰

the children of the first marriage sums of money, and added: "Having provided for the whole of my first children, I now declare," etc. Held, that the words quoted indicated an intention that the testator's children by the first marriage should take nothing more by the will, and that the term "my heirs," subsequently used therein, referred solely to testator's children by his second marriage.

¹⁵ *Johnson v. Bodine*, 108 Iowa, 594, 79 N. W. 348; *Hayden v. Barrett*, 172 Mass. 472, 52 N. E. 530, 70 Am. St. Rep. 295; *Harrell v. Hagan*, 147 N. C. 111, 60 S. E. 909, 125 Am. St. Rep. 539; *Ives v. McNicoll*, 59 Ohio St. 402, 53 N. E. 60, 43 L. R. A. 772, 69 Am. St. Rep. 780; *DE WOLF v. MIDDLETON*, 18 R. I. 810, 26 Atl. 44, 31 Atl. 271, 31 L. R. A. 146, *Dunmore Cas. Wills*, 269.

¹⁶ *Brown v. Wright*, 194 Mass. 540, 80 N. E. 612; *Blodgett v. Stowell*, 189 Mass. 142, 75 N. E. 138; *Wyeth v. Stone*, 144 Mass. 441, 11 N. E. 729 (where a limitation over to the heirs at law of the testator's wife was held not to include an adopted son of the wife, adopted after the testator's death); *Reinders v. Koppelman*, 94 Mo. 338, 7 S. W. 288.

An adopted child is not entitled to take under a gift to "lawful heirs" where the will gave a legacy to such child under the designation of "my young friend." *Warden v. Overman*, 155 Iowa, 1, 135 N. W. 649.

¹⁷ *Smith v. Hunter*, 86 Ohio St. 106, 99 N. E. 91 (where adopted child permitted to take under a devise to the "heirs at law" of a beneficiary, although statute for adoption was enacted after the death of testator). See, also, *Wallace v. Noland*, 246 Ill. 535, 92 N. E. 956, 138 Am. St. Rep. 247.

¹⁸ *Smith v. Allen*, 32 App. Div. 374, 53 N. Y. Supp. 114.

¹⁹ *In re Session's Estate*, 70 Mich. 297, 38 N. W. 249, 14 Am. St. Rep. 500.

²⁰ *Angus v. Noble*, 73 Conn. 56, 46 Atl. 278 (where a clause in a will provided an annuity to certain persons, stated by the will to have no children, remainder to other heirs, other heirs of the testator are referred to); *Abel v. Abel*,

The meaning of the word in a bequest of personal property must be governed by the intent of the testator, and if his intent appears to be to designate those who are strictly his heirs, in the primary sense of the term, and not distributees, it must be so construed.²¹ In the absence of such manifest intent, the word is usually interpreted as referring to those who would take under the statute of distribution in event of intestacy;²² and this rule applies where the will directs the real estate to be turned into money, and the proceeds paid to the heirs at law.²³ Where real and personal property are included in a single provision, a gift to "heirs" will go to those technically described as heirs, unless it appears that testator intended the two kinds of property to go in different directions.²⁴

A devise to "heirs of H." may, in view of the circumstances, be construed as to H. and his heirs.²⁵ Where persons are mentioned in the will as being given nothing thereunder, they, though heirs, will not take under a remainder to the testator's heirs.²⁶ But a

201 Pa. 543, 51 Atl. 333 (where a will gave certain property to the testator's son for life, and provided that at his death it shall be sold for the benefit of the "heirs," the heirs referred to are those of the testator); *In re Frith*, 85 Law T. 455.

²¹ *Sweet v. Dutton*, 109 Mass. 589, 591, 12 Am. Rep. 744; *Mason v. Baily*, 6 Del. Ch. 129, 14 Atl. 300; *Gordon v. Small*, 53 Md. 550.

Thus where a testator domiciled in Massachusetts directed that all the residue of his estate, real and personal, be divided into four equal parts, one of which was to go to P. for life, remainder to her heirs at law, and he left only personal property in Massachusetts, his real estate being in New Hampshire, where the devisee resided, it was held that the heirs at law, so far as the personality was concerned, were to be ascertained by the law of Massachusetts, and that they are such persons as would be entitled to succeed to real estate in case of intestacy. *Lincoln v. Perry*, 149 Mass. 368, 21 N. E. 671, 4 L. R. A. 215.

²² *Jacobs v. Prescott*, 102 Me. 63, 65 Atl. 761; *White v. Stanfield*, 146 Mass. 424, 15 N. E. 919; *Reen v. Wagner*, 51 N. J. Eq. 1, 26 Atl. 467; *In re Fidelity Trust & Guaranty Co.*, 57 App. Div. 532, 68 N. Y. Supp. 257; *Lee v. Baird*, 132 N. C. 755, 44 S. E. 605; *Appeal of Purviance*, 136 Pa. 153, 20 Atl. 397; *In re Ashton's Estate*, 134 Pa. 390, 19 Atl. 699.

Even where the gift is of personality only, the term "heirs at law" is sometimes held *prima facie* to include only those entitled to take real estate by descent. *Hartford Trust Co. v. Purdue* (1911) 84 Conn. 256, 79 Atl. 581; *Ruggles v. Randall*, 70 Conn. 44, 38 Atl. 885.

²³ *Lawrence v. Crane*, 158 Mass. 392, 33 N. E. 605; *Kendall v. Gleason*, 152 Mass. 457, 25 N. E. 838, 9 L. R. A. 509.

²⁴ *Gray v. Whittemore*, 192 Mass. 367, 78 N. E. 422, 116 Am. St. Rep. 246, 10 L. R. A. (N. S.) 1143; *Allison v. Allison's Ex'rs*, 101 Va. 537, 44 S. E. 904, 63 L. R. A. 920.

²⁵ *White v. Rukes* (C. C.) 37 Fed. 754.

²⁶ *Burke v. Millikin*, 69 N. H. 501, 45 Atl. 401; *Johnson v. Bank*, 192 Ill. 541, 61 N. E. 379.

prior bequest to an heir does not prevent his sharing under a residuary bequest to the testator's heirs.²⁷

Although the living can have no heirs, the courts construe a gift to the heirs of a living person as a gift to those who would be his heirs, if he were dead, where such a construction was evidently intended by the testator.²⁸

Beneficiary Described by Occupation

A bequest of a law library to "nephews who may read law" includes nephews who are practicing attorneys and those who are studying law with a view of becoming such, but does not include one who, although he had studied law for a time, had abandoned all intention of coming to the bar.²⁹

BENEFICIARIES DESCRIBED AS A CLASS

116. A gift to a class is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are to take in equal or some other definite proportions, the share of each being dependent for its amount upon the ultimate number of persons.

This definition of Mr. Jarman's³⁰ is clear and has been generally approved.³¹ The language of the will must disclose an intention to

²⁷ *Griffin v. Ulen*, 139 Ind. 565, 39 N. E. 254.

²⁸ *Healy v. Healy*, 70 Conn. 467, 39 Atl. 793; *Harris v. Ingalls*, 74 N. H. 339, 68 Atl. 34.

²⁹ *Appeal of Davis*, 169 Pa. 602, 32 Atl. 654. So a bequest to such of certain persons as are preparing for the ministry includes those who have begun a theological course, but not one following a general course of study with a view to theological study. *Clayton v. RoBards*, 54 Mo. App. 539.

³⁰ 1 Jar. Wills, *232.

Where numerous legacies are given to specific persons and to classes of persons, a class, receiving any legacy, should be treated as a unit in applying a residuary clause which provided that, in case of a surplus over the amount necessary to pay legacies, it should be distributed equally among all the legatees "named." *Ruggles v. Randall*, 70 Conn. 44, 38 Atl. 885. So under a bequest of the income of property to the testator's wife and the heirs of his mother, the wife is entitled to one-half the income. *Perkins v. Stearns*, 163 Mass. 247, 39 N. E. 1016. Accord: *In re Ihrie's Estate*, 162 Pa. 369, 29 Atl. 750; *Haas v. Atkinson*, 20 D. C. 537; *Rushmore v. Rushmore*, 59 Hun, 615, 12 N. Y. Sppp. 776.

³¹ *MURPHY'S ESTATE*, 157 Cal. 63, 106 Pac. 230, 137 Am. St. Rep. 110, *Dunmore Cas. Wills*, 241; *In re King's Estate*, 200 N. Y. 189, 93 N. E. 484, 34 L. R. A. (N. S.) 945, 21 Ann. Cas. 412.

create a class; otherwise the beneficiaries will take distributively.³² Thus, where the testator devised his real estate to his second wife and his children by her—naming them—in equal portions, the devisees took as tenants in common, and as a class.³³ But while the enumeration of beneficiaries by name is strongly significant of an intention not to regard them as a class,³⁴ yet it is not conclusive, as it may appear that the enumeration was had for the purpose of fixing with certainty the class membership.³⁵ And the fact that the words “share and share alike” are used in a gift to children does not prevent the beneficiaries taking as a class.³⁶ A gift to the children of a son³⁷ or to heirs,³⁸ or a direction to the executor to distribute the residue “under the intestate laws” of a certain state,³⁹ constitutes a gift to a class. An inaccurate enumeration of a class may be rejected, and the whole class be allowed to share in the gift, when the will discloses an intention to benefit the entire class.⁴⁰ And in a gift to children as a class, illegitimate children may be included when the surrounding circumstances show a strong probability that the testatrix intended to include such children in the gift.⁴¹

³² *In re Russell*, 168 N. Y. 169, 61 N. E. 166. And see *In re Moss*, 68 Law J. Ch. 598, [1899] 2 Ch. 314, 81 Law T. (N. S.) 139.

If words which, standing alone, would create a class, are followed by equally operative words of devise to devisees by name, the devisees take individually. *IN RE MURPHY'S ESTATE*, supra.

³³ *Frost v. Curtis*, 167 Mass. 251, 45 N. E. 687. Accord: *Moffett v. Elmen-dorf*, 152 N. Y. 475, 46 N. E. 845, 57 Am. St. Rep. 529; *Rockwell v. Bradshaw*, 67 Conn. 9, 34 Atl. 758; *Morris v. Bolles*, 65 Conn. 45, 31 Atl. 538; *Ritch v. Talbot*, 74 Conn. 137, 50 Atl. 42; *McDonald v. McDonald*, 71 App. Div. 116, 75 N. Y. Supp. 674; *Hornberger v. Miller*, 163 N. Y. 578, 57 N. E. 1112; *Kent v. Kent*, 106 Va. 199, 55 S. E. 564.

See, also, *McIntire v. McIntire*, 14 App. D. C. 337; *Stanwood v. Stanwood*, 179 Mass. 223, 60 N. E. 584; *Lyman v. Coolidge*, 176 Mass. 7, 56 N. E. 831; *Auger v. Tatham*, 191 Ill. 296, 61 N. E. 77.

³⁴ See cases in above note. *In re Wilcox* (1903) 64 N. J. Eq. 322, 54 Atl. 296.

³⁵ *Roosevelt v. Porter*, 36 Misc. Rep. 441, 73 N. Y. Supp. 800; *Swallow v. Swallow*, 166 Mass. 241, 44 N. E. 132; *Chase v. Peckham*, 17 R. I. 385, 22 Atl. 285.

³⁶ *Smith v. Haynes*, 202 Mass. 531, 89 N. E. 158; *Tate v. Tate* (1912) 126 Tenn. 169, 148 S. W. 1042.

³⁷ *Gates v. Selbert*, 157 Mo. 254, 57 S. W. 1065, 80 Am. St. Rep. 625; *Bethel v. Major* (Ky.) 68 S. W. 631; *Trenton Trust & Safe Deposit Co. v. Sibbits*, 62 N. J. Eq. 131, 49 Atl. 530.

³⁸ *Plummer v. Shepherd*, 94 Md. 466, 51 Atl. 173.

³⁹ *In re McGovran's Estate*, 190 Pa. 375, 42 Atl. 705.

⁴⁰ *In re Stephenson*, [1896] 1 Ch. 75.

⁴¹ *In re Du Bochet*, 70 Law J. Ch. 647, [1901] 2 Ch. 441, 84 Law T. 710.

Unless there is a manifest intent to the contrary, a member of a class to whom a legacy is given is not excluded by reason of the fact that he has received an individual legacy in a prior part of the will.⁴²

Substitutional Legacies to a Class

Legacies of this character commonly occur when the share which the issue are to take is by a prior clause expressed to be given to the parent of such issue.⁴³ While it is reasonably well settled that a gift over of the legacy or share of a single legatee takes effect if the event terminating the prior estate happens in the testator's lifetime,⁴⁴ yet the rule does not apply where the bequest is to a class, and the gift over is construed as a gift only of the shares of members of the class; i. e., as a substitutional gift.⁴⁵ Here the question as to whether a gift is to take effect upon the death of an individual depends upon whether he was a member of the class upon which the original gift was bestowed. If he was not, there can be no substitutional legacy, for there was nothing to go over to the substitutional beneficiaries.⁴⁶ Thus, where a bequest was made to nephews and nieces, with limitation over to their issue in event of the death of any of them in the lifetime of the testator, the issue of nephews and nieces who were dead at the time when the will was made could take nothing.⁴⁷ It has even been held that the same result would follow when the death of the original beneficiary occurred after the making of the will, and prior to that of the testator,

⁴² *Willis v. Richardson*, 212 Mass. 31, 98 N. E. 609.

⁴³ See *Lanphier v. Buck*, 2 Drew & Sm. 484, 494, for good statement as to when gift is substitutional.

⁴⁴ *Hawkins*, Wills, 243.

⁴⁵ *Ive v. King*, 16 Beav. 46, 53. See *In re Herr's Estate*, 28 Pa. 467.

⁴⁶ *In re Porter's Trusts*, 4 K. & L. 191.

⁴⁷ *Christopherson v. Naylor*, 1 Mer. 320. In this case Sir William Grant, M. R., said: "The nephews and nieces are the primary legatees; nothing whatever is given to their issue except in the way of substitution. In order to claim under the will, these substituted legatees must point out the original legatees in whose place they demand to stand. But of the nephews and nieces of the testator none could have taken beside those who were living at the date of the will. The issue of those who were dead at that time can consequently show no object of substitution." Accord: *In re Morrison's Estate*, 139 Pa. 306, 20 Atl. 1057. Semble: *Peel v. Catlon*, 9 Sim. 372; *In re Musther*, 43 Ch. Div. 569; *Gray v. Garman*, 2 Hare, 268; *In re Offiler*, 83 Law T. 758; *In re Crawford*, 113 N. Y. 366, 21 N. E. 142; *DUNN v. CORY*, 56 N. J. Eq. 507, 39 Atl. 368, *Dunmore Cas. Wills*, 231; *Wescott v. Higgins*, 42 App. Div. 69, 58 N. Y. Supp. 938, affirmed without opinion in 169 N. Y. 582, 62 N. E. 1101; *In re United States Trust Co.*, 36 Misc. Rep. 378, 73 N. Y. Supp. 635; *Tiffany v. Emmet*, 24 R. I. 411, 53 Atl. 281.

Christopherson v. Naylor has been severely criticized as defeating the real intention of the testator, in *Potters' Trust*, L. R. 8 Eq. Cas. 52, 39 L. J. Ch. 102, 20 L. T. 649, and this criticism seems to the writer to be a just one.

where the limitation over was after the death of a life tenant,⁴⁸ but this holding has been disapproved.⁴⁹ In a few American cases, where a substitutional gift has been made to children or heirs, following a general gift to a class, the children of parents who died before the will was executed have been permitted to take.⁵⁰ If the will, however, makes it evident that the testator had in mind the future death of a beneficiary as giving rise to the limitation over, the issue of those who are dead at the time of execution do not come in.⁵¹

It is imperative to distinguish, however, between substitutional gifts, and those which, though such in form, are in reality substantive, independent, and original.⁵² Where the children and the issue of children form distinct classes, the latter in no way taking by way of substitution for the former,⁵³ the doctrine of the preceding cases has no application. Thus, if a gift be to the children of A., followed by a proviso that, if any child of A. shall die before the period of distribution, the issue of such child shall be entitled to the share which such child would have taken if living, this may be construed as a substantive gift to the issue, so as to entitle the issue of a child dead at the date of the will, or dying in the testator's lifetime, to share under it.⁵⁴ The words "shall die," or "shall happen to die," do not necessarily point to a future death, so as to exclude the issue of a child who may have died before the date of the will,⁵⁵ nor does a direction that the issue shall take the share which their parents or ancestor would have taken necessarily render the gift substitutional.⁵⁶

⁴⁸ *Thornhill v. Thornhill*, 4 Madd. 377.

⁴⁹ *Smith v. Smith*, 8 Sim. (8 Eng. Ch.) 353.

⁵⁰ *Anderson v. Wilson* (1912) 155 Iowa, 415, 136 N. W. 134; *Huntress v. Place*, 137 Mass. 409; *Yates v. Shern*, 84 Minn. 161, 86 N. W. 1004.

⁵¹ Such is the case when the gift is to a "class or to their issue living at their decease," *Congreve v. Palmer*, 16 Beav. 435; or "to the children of A. then living and the issue of any of said children." *In re Thompson*, 2 W. R. 218.

⁵² 2 Jar. Wills, *1588.

⁵³ *Wheeler v. Allan*, 54 Me. 233.

⁵⁴ *Hawkins, Wills*, 249; *Loring v. Thomas*, 1 Dr. & Sur. 497; *Smith v. Smith*, 8 Sim. 353. *Semble*: *Coulthurst v. Carter*, 15 Beav. 421; *Rust v. Baker*, 8 Sim. 443; *Outcalt v. Outcalt*, 42 N. J. Eq. 500, 8 Atl. 532.

⁵⁵ *Loring v. Thomas*, 1 Dr. & Sur. 497; *Christopherson v. Naylor*, 1 Mer. 320; *In re Cochran's Estate* (Del. Ch.) 85 Atl. 1070.

⁵⁶ *In re Cochran's Estate*, *supra*; *Tytherleigh v. Harbin*, 6 Sim. 329; *Gites v. Gites*, 8 Sim. 360; *Jarvis v. Pond*, 9 Sim. 549. See *Long v. Labor*, 8 Pa. 229.

These questions are thus briefly summarized in *Hawkins, Wills*, 251 (from which, as the cases involving them are largely English, the writer has already quoted at length): (1) A gift to individuals, as to A. and B. or their issue. Here the issue take by substitution for A. or B., whether the latter die in the

Where a remainder is limited to a class, with a provision that the children or issue of its members who die prior to the termination of the particular estate shall take the shares to which their parents would have been entitled in event of survivorship, and the will does not indicate whether or no such issue must survive the termination of the particular estate to render their estate absolute, the better and more modern rule is that their estate is not defeasible, but that it becomes absolute upon the death of the parents, and that, upon their death prior to the time for distribution, their interest goes to their heirs or next of kin.⁵⁷

COMMON-LAW RULE IN EVENT OF LAPSE—AS MODIFIED BY STATUTE

117. At common law, in event of the death of a member of a beneficiary class under a will, prior to the vesting of the interest thereby created, his potential interest was defeated.
118. The rule has been largely modified by statutes preventing such lapse in the case of certain beneficiaries.

The common-law rule respecting lapse upon the death of a beneficiary prior to that of the testator⁵⁸ operated upon the death of the member of a class,⁵⁹ in the absence of provisions in the will to the contrary. The usual statutes, providing ordinarily that in event of a gift to a child or relative of the testator, who dies before the latter, his issue shall take the interest which his ancestor would have taken had he survived the testator,⁶⁰ are commonly construed

testator's lifetime or are dead at the date of the will, whether the gift be immediate or in remainder. (2) A gift to the children of A. or their issue. Here, if the gift be immediate, the issue of a child dying in the testator's lifetime take, but not, apparently, the issue of a child dead at the date of the will. If the gift be in remainder after a life interest, the issue of a child who does not survive the testator are excluded. (3) A gift to the children of A. living at a given period, and the issue of such as shall then be dead. Here the gift to issue is independent, and the issue of a child dying in the testator's lifetime, or dead at the date of the will, may take.

⁵⁷ *Lamphier v. Buck*, 2 Dru. & Sur. 484; *In re Merrick*, L. R. 1 Eq. 551; *In re Wildman*, 1 Johns. & H. 302; *Shaw v. Eckley*, 169 Mass. 119, 47 N. E. 609; *In re Pell*, 3 De G., F. & J. 291; *Crane v. Bolles*, 49 N. J. Eq. 373, 24 Atl. 237. Contra: *In re Denton*, 137 N. Y. 428, 33 N. E. 482.

⁵⁸ *Jackson v. Alsop*, 67 Conn. 249, 34 Atl. 1106; *Palmer v. Munsell* (N. J. Ch.) 46 Atl. 1094; *In re Kimball's Will*, 20 R. I. 619, 40 Atl. 847.

⁵⁹ *Ashhurst v. Potter*, 53 N. J. Eq. 608, 32 Atl. 698; *Gammell v. Ernst*, 19 R. I. 292, 33 Atl. 222.

⁶⁰ See post, p. 515.

as applying to gifts to a class.⁶¹ It has sometimes been held, however, that these statutes have no application in such cases—this on the ground that their purpose is to prevent lapse, and that there is no lapse upon the death of a member of a class, since such a gift is to be interpreted as being only to such members as survive the testator;⁶² and it has even been held that the statute will not apply to a gift to a class of which there was but a single member.⁶³

Unless the statute preventing lapse expressly extends to persons dead when the will was made, it is generally held that a gift to a class does not include members of the class who were dead when the will was made⁶⁴ and their issue or relatives cannot take in their stead.

The testator not infrequently makes provision for the death of a beneficiary occurring during his own life. Ordinarily a gift over in event of death, without indication as to the period within which the death is to occur, is construed as referring to a death happening during the life of the testator.⁶⁵ But this rule yields to the manifest intention of the testator. Thus, where a testator seventy-eight years old devised certain land to his son for life, remainder to the son's wife and children, share and share alike, "the issue of such as may have died to take the share to which his parent would have been entitled," it was held, in view of the advanced age of the testator as compared with that of his grandchildren, that

⁶¹ *Rudolph v. Rudolph*, 207 Ill. 266, 69 N. E. 834, 99 Am. St. Rep. 211; *In re Nicholson's Will*, 115 Iowa, 493, 88 N. W. 1064; *Ruff v. Baumbach*, 114 Ky. 336, 70 S. W. 828; *Sloan v. Thornton*, 102 Ky. 443, 43 S. W. 415; *Chenault's Guardian v. Chenault's Estate* (Ky.) 9 S. W. 775; *In re Stockbridge*, 145 Mass. 517, 14 N. E. 928; *Woolley v. Paxson*, 46 Ohio St. 307, 24 N. E. 599; *In re Bradley's Estate*, 166 Pa. 300, 31 Atl. 96.

⁶² *Trenton Trust & Safe Deposit Co. v. Sibbits*, 62 N. J. Eq. 131, 49 Atl. 530; *Martin v. Trustees*, 98 Ga. 320, 25 S. E. 522.

⁶³ *In re Harvey*, [1893] 1 Ch. 567.

Contra: *Cheney v. Selman*, 71 Ga. 384.

⁶⁴ *In re Nicholson*, 115 Iowa, 493, 88 N. W. 1064, 91 Am. St. Rep. 175; *White v. Mass. Inst. T.*, 171 Mass. 84, 50 N. E. 512; *Pimel v. Betjemann*, 183 N. Y. 194, 76 N. E. 157, 2 L. R. A. (N. S.) 580, 5 Ann. Cas. 239; *In re Harrison's Estate*, 202 Pa. 331, 51 Atl. 976.

Contra: *Bray v. Pullen*, 84 Me. 185, 24 Atl. 811; *Jamison v. Hay*, 46 Mo. 546.

⁶⁵ *Jackman v. Jackman* (Ky. 1903) 73 S. W. 776; *Ruggles v. Randall*, 70 Conn. 44, 38 Atl. 885; *Antioch College of Yellow Springs v. Branson*, 145 Ind. 312, 44 N. E. 314; *Stratton v. McKinnie* (Tenn. Ch. App.) 62 S. W. 636; *Brown v. Lippincott*, 49 N. J. Eq. 44, 23 Atl. 497; *Washbon v. Cope*, 144 N. Y. 287, 39 N. E. 388; *Conkle v. Grisson*, 24 Misc. Rep. 115, 52 N. Y. Supp. 500; *Stevenson v. Fox*, 125 Pa. 568, 17 Atl. 480, 11 Am. St. Rep. 922; *In re Durfee*, 17 R. I. 639, 24 Atl. 50; *Lovass v. Olson*, 92 Wis. 616, 67 N. W. 605; *Patton v. Ludington*, 103 Wis. 629, 79 N. W. 1073, 74 Am. St. Rep. 910.

the obvious intention was that the period of death included the time subsequent to the death of the testator and before that of the son.⁶⁶

TIME OF ASCERTAINING THE MEMBERS OF A CLASS

119. An immediate gift to a class will, in the absence of a testamentary intent to the contrary, vest in those of the class who are in existence at the testator's death.

120. When a testamentary disposition is made to a class, and possession is postponed, it includes all persons within the class at the time to which possession is postponed, and excludes those who are not in existence at the time of the distribution. This rule is subject to two limitations:

- (a) Where the limitation over is to the heirs of the testator, this class is determined as of the death of the testator, in the absence of a testamentary intent to the contrary.
- (b) Where the limitation over is to children, either of the testator or the first taker, it will embrace both those who are in existence at the death of the testator, and such as may subsequently come into being before the period of distribution.

Immediate Gift

The rule as regards immediate gifts is well settled,⁶⁷ and finds abundant illustration and reiteration in the cases.⁶⁸ Thus a be-

⁶⁶ Lyons v. Weeks, 53 App. Div. 212, 65 N. Y. Supp. 818, reversing 29 Misc. Rep. 714, 61 N. Y. Supp. 441. Accord: Naylor v. Godman, 109 Mo. 543, 19 S. W. 56. Semble: Cooksey v. Hill, 106 Ky. 297, 50 S. W. 235.

⁶⁷ HOWLAND v. SLADE, 155 Mass. 415, 29 N. E. 631, Dunmore Cas. Wills, 245. The rule in the black-letter text is taken substantially from the language of the court in this case.

The courts of Kentucky have, however, refused to apply this rule in gifts to children as a class, and have permitted children born after testator's death to share with those living at his death. Barker v. Barker, 143 Ky. 66, 135 S. W. 396; Goodridge v. Schaefer (Ky. 1902) 68 S. W. 411; Lynn v. Hall, 101 Ky. 738, 43 S. W. 402, 72 Am. St. Rep. 439.

⁶⁸ Lancaster v. Lancaster, 187 Ill. 540, 58 N. E. 462, 79 Am. St. Rep. 234; Morgan v. Robbins, 152 Ind. 362, 53 N. E. 283; In re Nicholson's Will, 115 Iowa, 493, 88 N. W. 1064, 91 Am. St. Rep. 175; Demill v. Reid, 71 Md. 175, 17 Atl. 1014; Hooper v. Smith, 88 Md. 577, 41 Atl. 1095; Swasey v. Jaques, 144 Mass. 135, 10 N. E. 758, 59 Am. Rep. 65; Clark v. Mack (1910) 161 Mich. 545, 126 N. W. 632; In re Ruggles' Estate, 104 Me. 333, 71 Atl. 933; Brewster v. Mack, 69 N. H. 52, 44 Atl. 811; Cody v. Bunn's Ex'r, 46 N. J. Eq. 131, 18 Atl. 857; In re Watts, 68 App. Div. 357, 74 N. Y. Supp. 75; Jones v. Hunt, 96 Tenn. 369, 34 S. W. 693.

quest to the legal heirs of J.'s children goes to such heirs as are living at the testator's death.⁶⁹ A will providing for those "who are the children" of certain relatives is interpreted as limiting the provision to such as are alive when the testator died,⁷⁰ and where there is an immediate gift to a person named and his children, only those children take who are living at the death of the testator.⁷¹ So a bequest to a daughter, with a limitation over in event of her dying unmarried, involves her death in that condition prior to that of the testator.⁷² And where a devise was made to children, with a proviso that in case of the death of any of the children their interest should go over to their children, the interest of the children who survived the testator was treated as absolute, and not defeasible by their subsequent death.⁷³ And where a will contained a bequest to each of six grandchildren, payable on their attaining a certain age, with a limitation over to the surviving grandchildren in case any deceased before reaching that age, grandchildren born after the testator's death cannot share in such limitation.⁷⁴

Where this principle applies, those members of the class who have died prior to the testator transmit no interest to their heirs or representatives, unless the gift is saved by the statute to prevent lapse;⁷⁵ neither can one born subsequent thereto take as a member of the class.⁷⁶ A child en ventre sa mère is sufficiently in esse for this purpose, however.⁷⁷

This principle applies to immediate gifts to the survivor or survivors of a class.⁷⁸ Thus, where a will contained devises to trustees for the use of the testator's brothers and sisters, with a provision

⁶⁹ *Healy v. Healy*, 70 Conn. 467, 39 Atl. 793.

⁷⁰ *Ingraham v. Ingraham*, 169 Ill. 432, 48 N. E. 561, 49 N. E. 320.

⁷¹ *Moore v. Ennis* (Del. Ch.) 87 Atl. 1009; *Coogler v. Crosby*, 89 S. C. 508, 72 S. E. 149; *Wills v. Foltz* (1907) 61 W. Va. 262, 56 S. E. 473, 12 L. R. A. (N. S.) 283.

⁷² *In re Jackson's Estate*, 179 Pa. 77, 36 Atl. 156.

⁷³ *Wills v. Wills*, 85 Ky. 486, 3 S. W. 900.

⁷⁴ *In re Smith*, 131 N. Y. 239, 30 N. E. 130, 27 Am. St. Rep. 586.

⁷⁵ *Yates v. Shern*, 84 Minn. 161, 86 N. W. 1004; *In re Hoopes' Estate*, 185 Pa. 172, 39 Atl. 888; *Chase v. Peckham*, 17 R. I. 385, 22 Atl. 285.

⁷⁶ *Pierce v. Knight*, 182 Mass. 72, 64 N. E. 692 (where a sum was given to each of the children of the testator's nephews and nieces).

⁷⁷ *Randolph v. Randolph*, 40 N. J. Eq. 73, with note (where gift to grandchildren "living at the time of my decease"); *Culp v. Lee*, 109 N. C. 675, 14 S. E. 74.

⁷⁸ *Arnold v. Alden*, 173 Ill. 229, 50 N. E. 704; *Aspy v. Lewis*, 152 Ind. 493, 52 N. E. 756; *Davis v. Davis*, 118 N. Y. 411, 23 N. E. 568 (here, however, the intention of the testator was unequivocally expressed); *In re Smith*, 59 Hun, 616, 14 N. Y. Supp. 947; *Flick v. Oil Co.*, 188 Pa. 317, 41 Atl. 535; *Armistead's Ex'rs v. Hartt*, 97 Va. 316, 33 S. E. 616; *First Nat. Bank v. De Pauw*, 86 Fed. 722, 30 C. C. A. 360.

that, if any brother or sister died without issue, the share which he would have taken if living shall "be equally divided among surviving brothers and sisters," the words of survivorship relate to the death of the testator.⁷⁹ But here, as elsewhere, the testator's intent controls. Thus a gift to two specified great-grandchildren, with a proviso that, upon the death of either without heirs the decedent's share should go to the survivor, was held not to refer to a death in the life of the testatrix, but to the death of one after the interest had contingently vested in both.⁸⁰

Gift Postponed

When a gift to a class is postponed, either to a particular time, or pending the termination of a preceding estate, as a rule, those members of the class, and those only, take who are in existence at the arrival of the time of distribution,⁸¹ as in the case of a limitation over to "daughters who may be unmarried" after a life estate,⁸² or to such children of a certain person as may be living,⁸³ or to children "then living" at the death of the testator's widow.⁸⁴ So generally, where final division is to be made among a class, the gift being contingent upon survivorship, the benefits of the will are confined to those who come within the category at the time when the distribution is directed to be made.⁸⁵ Thus a lim-

⁷⁹Arnold v. Alden, 173 Ill. 229, 50 N. E. 704.

⁸⁰In re Cramer, 170 N. Y. 271, 63 N. E. 279.

⁸¹Phinzy v. Foster, 90 Ala. 262, 7 South. 836; Ballentine v. Foster, 128 Ala. 638, 30 South. 481; In re Cavarly's Estate, 119 Cal. 406, 51 Pac. 629; Healy v. Healy, 70 Conn. 467, 39 Atl. 793; Webber v. Jones, 94 Me. 429, 47 Atl. 903; Levering v. Orrick (1903) 97 Md. 139, 54 Atl. 620; Naylor v. Godman, 109 Mo. 543, 19 S. W. 56; Akerman v. Akerman, 71 N. H. 55, 51 Atl. 252; Hall v. Blodgett, 70 N. H. 437, 48 Atl. 1085; Dutton v. Pugh, 45 N. J. Eq. 426, 18 Atl. 207; Haug v. Schumacher, 166 N. Y. 506, 60 N. E. 245; Cox v. Wisner, 167 N. Y. 579, 60 N. E. 1109; Schwencke v. Haffner, 22 Misc. Rep. 293, 50 N. Y. Supp. 165; In re Allen, 151 N. Y. 243, 45 N. E. 554; In re Denlinger's Estate, 170 Pa. 104, 32 Atl. 573; In re Schuldt's Estate, 199 Pa. 58, 48 Atl. 879; Shanks v. Mills, 25 S. C. 358; Nichols v. Guthrie, 109 Tenn. 535, 73 S. W. 107; Webber v. Webber, 108 Wis. 626, 84 N. W. 896.

⁸²Robertson v. Garrett, 72 Tex. 372, 10 S. W. 96; Robinson v. Martin, 200 N. Y. 159, 93 N. E. 488.

⁸³Hills v. Barnard, 152 Mass. 67, 25 N. E. 96, 9 L. R. A. 211; Cox v. Wisner, 167 N. Y. 579, 60 N. E. 1109.

⁸⁴Vaughan v. Vaughan's Ex'x, 97 Va. 322, 33 S. E. 603; In re Everitt's Estate, 195 Pa. 450, 46 Atl. 1.

⁸⁵Schwencke v. Haffner, 22 Misc. Rep. 293, 50 N. Y. Supp. 165; Wilson v. Bull, 97 Md. 128, 54 Atl. 629; In re Lamb's Estate, 122 Mich. 239, 80 N. W. 1081; Jones v. Jones, 46 N. J. Eq. 554, 21 Atl. 950; Coveny v. McLaughlin, 148 Mass. 576, 20 N. E. 165, 2 L. R. A. 448; Dutton v. Pugh, 45 N. J. Eq. 426, 18 Atl. 207; In re Valentine, 59 Hun, 619, 13 N. Y. Supp. 444; In re Lewis' Estate, 203 Pa. 219, 52 Atl. 208; Barber v. Crawford, 85 S. C. 54, 67 S. E. 7; Roundtree v. Roundtree, 26 S. C. 450, 2 S. E. 474; Inderwick v. Tatchell, 71

itation over to "my surviving legatees" after the termination of a previous estate means the legatees surviving the period of distribution, and not those surviving the testator,⁸⁶ and so with a limitation to the surviving brothers and sisters of the testator.⁸⁷ But the rule readily yields to any indication of the testator's intention to the contrary. Thus where, after devising certain real estate to his wife, the testator provided that after her death the property should be sold, and the proceeds divided among his surviving brothers and sisters, and the children of such as might be dead, the term "surviving" was construed as referring to those surviving at the testator's death.⁸⁸

A limitation over to the surviving brothers of the life tenant includes a brother of the half blood, descended from the testator.⁸⁹ And a devise to a class or the survivors will carry the interest to a solitary survivor.⁹⁰

Limitation to Heirs

Giving the term "heir" its technical significance as the person appointed by law to succeed to the estate, a limitation over to the testator's heirs refers to those who are such at the time of his death, and not those who may be heirs at the termination of the preceding estate,⁹¹ and the same rule applies to limitations to next of kin,⁹² relations⁹³ or representatives.⁹⁴ But where a bequest to the testator's heirs at law at the time the will was made described his brothers and sisters by the then law, but, by a subsequent change in the law of descent, came to mean his widow, for whom he had amply provided in the will, the words were construed as of

Law J. Ch. 1, [1901] 2 Ch. 738, 85 Law T. 432; *King v. Frost*, L. R. 15 App. Cas. 548.

⁸⁶ *Selman v. Robertson*, 46 S. C. 262, 24 S. E. 187. *Semble*: *Appeal of Woelpper*, 126 Pa. 562, 17 Atl. 870.

⁸⁷ *In re Winter's Estate*, 114 Cal. 186, 45 Pac. 1063.

⁸⁸ *Grimmer v. Friederich*, 164 Ill. 245, 45 N. E. 498; *Stone v. Lewis*, 84 Va. 474, 5 S. E. 282. *Semble*: *Lee v. Welch*, 163 Mass. 312, 39 N. E. 1112; *Bryant v. Flanders*, 201 Mass. 373, 87 N. E. 574.

⁸⁹ *McNeal v. Sherwood*, 24 R. I. 314, 53 Atl. 43.

⁹⁰ *Prendergast v. Walsh*, 58 N. J. Eq. 149, 42 Atl. 1049.

⁹¹ *Johnson v. Webber*, 65 Conn. 501, 33 Atl. 506; *Merrill v. Wooster*, 99 Me. 460, 59 Atl. 596; *White v. Underwood*, 215 Mass. 299, 102 N. E. 426; *Tuttle v. Woolworth*, 62 N. J. Eq. 532, 50 Atl. 445; *In re Fitzpatrick's Estate*, 233 Pa. 33, 81 Atl. 815, Ann. Cas. 1913B, 320; *Allison v. Allison's Ex'rs*, 101 Va. 537, 44 S. E. 904, 63 L. R. A. 920; *Stokes v. Van Wyck*, 83 Va. 724, 3 S. E. 387.

⁹² *Keniston v. Mayhew*, 169 Mass. 166, 47 N. E. 612; *In re McFillin's Estate*, 235 Pa. 175, 83 Atl. 620; *Appeal of Bell*, 147 Pa. 383, 23 Atl. 599; *In re Nash*, 71 Law T. (N. S.) 5.

⁹³ *Cummings v. Cummings*, 146 Mass. 501, 16 N. E. 401.

⁹⁴ *Greene v. Huntington*, 73 Conn. 106, 46 Atl. 883.

the date of its execution.⁹⁵ And there are cases apparently contrary to the rule as above stated,⁹⁶ which is merely one of prima facie presumption, yielding at once to the testator's intention. Thus in a limitation over to the person or persons who "shall be" the testator's heirs on the happening of the contingency,⁹⁷ or to his "then" heirs,⁹⁸ or to the heirs "then surviving,"⁹⁹ the heirs were determined as of the time of the decease of the first taker. So a devise of land to the testator's wife for life, and after her death to his heirs and her heirs, share and share alike, refers to such of the heirs of the testator as are living at the death of the wife, rather than at the testator's death.¹ And where the first taker is an heir of the testator, and it is manifest that no other benefit is designed for him than that bestowed in the first estate, a limitation over to the heirs of the testator will be construed as to the heirs as of the time of his death, if, under the more usual construction, such taker might further share in the limitation over.² Thus, where realty was devised to the testator's two sisters for life, remainder to the survivor for life, and over to his heirs at law, with power in the life tenants to sell the land and use the proceeds for their support, realty undisposed of at the death of the surviving sister was held to go to the testator's heirs living at her death.³ But, usually, the fact that the one to whom the previous interest was given is a member of the class to which the limitation over is made, is not of itself sufficient to take the case out of the rule that the heirs are to be determined as of testator's death.⁴

⁹⁵ In re Swenson's Estate, 55 Minn. 300, 56 N. W. 1115.

⁹⁶ FORREST v. PORCH, 100 Tenn. 391, 45 S. W. 676, Dunmore Cas. Wills, 239.

⁹⁷ Welch v. Brimmer, 169 Mass. 204, 47 N. E. 699.

⁹⁸ Proctor v. Clark, 154 Mass. 45, 27 N. E. 673, 12 L. R. A. 721; Wood v. Schoen, 216 Pa. 425, 66 Atl. 79.

Compare: Boston Safe Deposit & Trust Co. v. Parker (1907) 197 Mass. 70, 83 N. E. 307.

⁹⁹ Wood v. Bullard, 151 Mass. 324, 25 N. E. 67, 7 L. R. A. 304. Semble: Peck v. Carlton, 154 Mass. 231, 28 N. E. 166.

¹ Bisson v. Railroad Co., 143 N. Y. 125, 38 N. E. 104. Semble: In re McKee's Estate, 198 Pa. 255, 47 Atl. 993.

² Cushman v. Goodwin, 95 Me. 353, 50 Atl. 50; Fargo v. Miller, 150 Mass. 225, 22 N. E. 1003, 5 L. R. A. 690. See Johnson v. Askey, 190 Ill. 58, 60 N. E. 76.

An intention that heirs shall be determined as of the time of termination of particular estate is sometimes found merely from the fact that the person to whom the particular estate is given is the only one answering the description of the class to which the limitation over is made. Welch v. Brimmer, 169 Mass. 204, 47 N. E. 699.

³ Cushman v. Goodwin, *supra*.

⁴ Kellett v. Shepard, 139 Ill. 433, 28 N. E. 751, 34 N. E. 254; Abbott v.

Limitation to Children

Where there is a limitation over to children, either of the holder of the previous estate or of another, the class includes both children living at the death of the testator and those who subsequently come into being before the arrival of the time for distribution. The remainder vests in children alive at the death of the testator, subject to open and let in after-born children.⁵ But the testator's intention that the gift shall be confined to children living at the expiration of the particular estate may be readily indicated, as where an estate is given for life with remainder to the children of a certain person "then" living,⁶ or to surviving children.⁷ And where there was a devise to the children of the testator's son, the land to be divided among them after the death of the son, the title was held to pass immediately to the devisees on the death of the testator, and no after-born children could take.⁸ And, in general, where there is an immediate bequest of an aggregate fund, part of which consists of reversions and expectancies, and for this reason not immediately distributable,⁹ or where it is not immediately distributable because the property is given in trust for conversion into money and distribution within a reasonable time,¹⁰ children born after the death of the testator will not take.

The doctrine as to the right of after-born children in general to take is further modified by the rule that, when a fund is bequeathed

Bradstreet, 85 Mass. (3 Allen) 587; Tuttle v. Woolworth, 62 N. J. Eq. 532, 50 Atl. 445.

See, also, Cushman v. Arnold, 185 Mass. 165, 70 N. E. 43.

⁵ INGE v. JONES, 109 Ala. 175, 19 South. 435, Dunmore Cas. Wills, 247; Johnson v. Webber, 65 Conn. 501, 33 Atl. 506; U. S. Fidelity & Guaranty Co. v. Douglas' Trustee (1909) 134 Ky. 374, 120 S. W. 328, 20 Ann. Cas. 993; Lombard v. Willis, 147 Mass. 13, 16 N. E. 737; Aldridge v. Aldridge, 43 App. Div. 411, 60 N. Y. Supp. 69; Evan's Estate, 155 Pa. 646, 26 Atl. 739; Franklin v. Franklin, 91 Tenn. 119, 18 S. W. 61; Kansas City Land Co. v. Hill, 87 Tenn. 589, 11 S. W. 797, 5 L. R. A. 45; Elkins v. Carsey (Tenn.) 3 S. W. 828; Cheatham v. Gower, 94 Va. 383, 26 S. E. 853. Semble: Toole v. Perry, 80 Ga. 681, 7 S. E. 118.

⁶ Ringquist v. Young, 112 Mo. 25, 20 S. W. 159; Nichols v. Guthrie (1903) 109 Tenn. 535, 73 S. W. 107; Connelly v. O'Brien, 40 App. Div. 574, 58 N. Y. Supp. 45; Schwencke v. Haffner, 18 App. Div. 182, 45 N. Y. Supp. 937; Patchen v. Patchen, 121 N. Y. 432, 24 N. E. 695, reversing 49 Hun, 270, 1 N. Y. Supp. 913; Dougherty v. Thompson, 27 Misc. Rep. 738, 59 N. Y. Supp. 608.

⁷ Coveny v. McLaughlin, 148 Mass. 576, 20 N. E. 165, 2 L. R. A. 448; Stout v. Cook (1911) 79 N. J. Eq. 573, 81 Atl. 821.

⁸ Wise v. Leonhardt, 128 N. C. 289, 38 S. E. 892. See, also, Sherman v. Baker, 20 R. I. 446, 40 Atl. 11, 40 L. R. A. 717.

⁹ Hawkins, Wills, 74; Hoggar v. Payne, 23 Beav. 474; Sherman v. Baker, 20 R. I. 446, 40 Atl. 11, 40 L. R. A. 717.

¹⁰ In re Landwehr's Estate, 147 Pa. 121, 23 Atl. 348.

to children as a class, the share of each child to be payable on attaining a given age, or marriage, the fund is to be distributed when the first child becomes entitled to receive his share, and hence children coming into existence after that period are excluded.¹¹ The reason is that the child first entitled cannot be kept waiting, and, once paid, the money cannot be got back again for the benefit of a subsequently born claimant.¹² The rule applies to gifts to grandchildren, and apparently to all classes of relatives heretofore discussed in this connection.¹³ The rule apparently applies, whether the vesting or the payment only be postponed to the given age.¹⁴

Where gift is of an aggregate fund, the addition of words of futurity, as to "children of A. born or to be born," does not prevent the application of the rule so as to let in children born after the first share has become payable.¹⁵

In the absence of an intention to the contrary as disclosed by the context,¹⁶ the rule does not apply to the case of gifts to children when the shares are made payable on the youngest attaining a given age, so as to exclude children born after the youngest for the time being has attained that age.¹⁷ All children, whenever born, are

¹¹ *Thornton v. Zea*, 22 Tex. Civ. App. 509, 55 S. W. 798; *Thomas v. Thomas*, 149 Mo. 426, 51 S. W. 111, 73 Am. St. Rep. 405; *Hubbard v. Lloyd*, 6 Cush. (Mass.) 523, 53 Am. Dec. 55; *Tucker v. Bishop*, 16 N. Y. 404; *Helise v. Markland*, 2 Rawle (Pa.) 275, 21 Am. Dec. 445; *Hawkins v. Everett*, 58 N. C. 44; *Andrews v. Partington*, 3 Bro. C. C. 403; *Whitbread v. Lord St. John*, 10 Ves. 152.

¹² *Gillman v. Daunt*, 3 K. & J. 48.

¹³ *Iredell v. Iredell*, 25 Beav. 485; *Baldwin v. Rogers*, 3 De Gex, M. & G. 649.

¹⁴ *Hawkins, Wills*, 70; *Gillman v. Daunt*, 3 K. & J. 48 (i. e., whether the gift be to "such children of A. as shall attain the age of 21," or "to the children of A. payable at 21"); *Hawkins v. Everett*, 58 N. C. 44; *Caywood v. Jones*, 32 Ky. Law Rep. 1302, 108 S. W. 888. Compare: *Kevern v. Williams*, 5 Sim. 171.

The general rule also seems to apply to all cases where the share of each child is made payable on an event personal to him or her. Thus, if the fund be given to the children of A., the share of each to be paid on attaining the age of twenty-one, or on death under that age, leaving issue, and a child dies under that age leaving issue, before any child has attained twenty-one, no after-born child can take. *Barrington v. Tristram*, 6 Ves. 344.

¹⁵ *Whitbread v. Lord St. John*, 10 Ves. 152; *Iredell v. Iredell*, 25 Beav. 485; *Helise v. Markland*, 2 Rawle (Pa.) 275, 21 Am. Dec. 445.

¹⁶ *Gooch v. Gooch*, 3 D. M. G. 366.

¹⁷ *Hawkins, Wills*, 77; *Mainwaring v. Beevor*, 8 Hare, 44. The distribution of the eldest child's share being postponed beyond the time when he himself attains the given age, "all the inconvenience is let in, and the eldest may have to wait for an indefinite time, so long as children may continue to be born." *Id.*

therefore admitted in general, when the payment is postponed until the happening of an event personal to the youngest¹⁸

The rule admitting after-born children does not apply where separate legacies are given to each of a class of objects, but the gift is confined to those living at the testator's death.¹⁹ Were it not so, the distribution of the personal estate of the testator would have to be postponed until it could be ascertained how many legacies of the given amount would be payable.

TAKING PER CAPITA OR PER STIRPES

121. In the case of a gift to a class, where the proportionate share of each member is not determined by the will, distribution per capita, rather than by representation per stirpes, will generally be had.

The law favoring equality, a gift to the children of two or more persons, whether expressed as to the children of A. and B., or to the children of A. and the children of B., means, in the absence of any indicated intent to the contrary, that the children shall take per capita, and not per stirpes,²⁰ and all take per capita where the gift is to A. and B. and their children as purchasers.²¹ And where the individuals of a class are specifically named, or are designated by their relation to some ancestor living at the date of the will, wheth-

¹⁸ Hawkins, Wills, 78; Fosdick v. Fosdick, 6 Allen (Mass.) 43; Handberry v. Doolittle, 38 Ill. 206.

¹⁹ If a gift be made of £50 each to all and every the children of A., payable at twenty-one, the children living at the testator's death alone are entitled. Ringrose v. Bramham, 2 Cox, 384; Mann v. Thompson, Kay, 638; Butler v. Lowe, 16 Eng. Ch. (10 Sim.) 317. Semble: Howland v. Howland, 11 Gray (Mass.) 476.

²⁰ McIntire v. McIntire, 192 U. S. 116, 24 Sup. Ct. 196, 48 L. Ed. 369; De Laurencel v. De Boom, 67 Cal. 362, 7 Pac. 758; Hughes v. Hughes, 118 Ky. 751, 82 S. W. 408, 26 Ky. Law Rep. 625; Dole v. Keyes, 143 Mass. 237, 9 N. E. 625; Hill v. Bowers, 120 Mass. 135; Post v. Herbert's Ex'rs, 27 N. J. Eq. 540; Farmer v. Kimball, 46 N. H. 435, 88 Am. Dec. 219; Young's Appeal, 83 Pa. 59.

So, in a devise, after a life estate, to be "equally divided between the bodily heirs of F. and J.," the children of F. and J. take per capita. Taylor v. Cribbs (1911) 174 Ala. 217, 56 South. 952.

²¹ Wills v. Foltz (1907) 61 W. Va. 262, 56 S. E. 473, 12 L. R. A. (N. S.) 283; Cunningham v. Murray, 1 De G. & Sm. 366.

But a gift to two or more persons, or their children, is substitutional, and the children take only their parents' share. Bartine v. Davis, 60 N. J. Eq. 202, 46 Atl. 577; Guild v. Allen, 28 R. I. 430, 67 Atl. 855.

er the testator or another, they take per capita.²² The testator may frequently make his intention clear by directing an equal division among the members of the class,²³ or that they shall take share and share alike.²⁴

It is said that the same rule applies in the case of a gift to a person and the children of another person who is dead, unless it appears from the context, or circumstances shown by competent extraneous evidence, that the testator intended a distribution per stirpes.²⁵ But while this is clearly the law, it is evident that no question of representation per stirpes can here be involved, where the parent would not have taken in event of intestacy, and the will discloses no intention to give the parent any interest to which the children could succeed by representation. The only question here is whether, with regard to distribution, the children are to be

²² 2 Jar. Wills, 194, Bigelow's Note; *Hardy v. Roach*, 190 Mass. 223, 76 N. E. 720; *Cuthbert v. Laing*, 75 N. H. 304, 73 Atl. 641; *Ridley v. McPherson*, 100 Tenn. 402, 43 S. W. 772 (where land was conveyed in trust for grantor's daughter during life, and on her death to her issue then living. Held, that the life tenant's daughter, her eight children, and two children of a deceased son would each take one-eleventh after the death of the life tenant); *Dole v. Keyes*, 143 Mass. 237, 9 N. E. 625; *Maguire v. Moore*, 108 Mo. 267, 18 S. W. 897 (where the limitation over was to the testator's grandchildren); *Pearce v. Rickard*, 18 R. I. 142, 26 Atl. 38, 19 L. R. A. 472, 49 Am. St. Rep. 755 (limitation over to "lawful issue" of the beneficiary for life); *Houghton v. Bell*, 23 Can. Sup. 498 (where the limitation was to children living and the children of those who may be dead); *Rogers v. Morrell*, 82 S. C. 402, 64 S. E. 143, 129 Am. St. Rep. 899.

So where the testator devised land to his wife for life, and after her death to his heirs and her heirs, their heirs and assigns, share and share alike, and at the wife's death her heirs were sixteen in number, representing three different stocks, while those of the testator were fourteen in number, representing four stocks, all were held to take as of the same class and per capita. *Bisson v. Railroad Co.*, 143 N. Y. 125, 38 N. E. 104. Accord: *Copeland v. Copeland*, 64 Ill. App. 100.

²³ *Almand v. Whitaker*, 113 Ga. 889, 39 S. E. 395; *Armstrong v. Crutchfield*, 150 Ky. 641, 150 S. W. 835; *Records v. Fields*, 155 Mo. 314, 55 S. W. 1021; *West v. Rassman*, 135 Ind. 278, 34 N. E. 991; *Kling v. Schnellbecker*, 107 Iowa, 636, 78 N. W. 673; *Johnston v. Knight*, 117 N. C. 122, 23 S. E. 92; *Marsh v. Dellinger*, 127 N. C. 360, 37 S. E. 494; *Ramsey v. Stephenson*, 34 Or. 408, 56 Pac. 520, 57 Pac. 195; *In re Stone*, [1895] 2 Ch. 196, 12 Rep. 415.

²⁴ *Follansbee v. Follansbee*, 7 App. D. C. 282; *McFatrige v. Holtzclaw*, 94 Ky. 352, 22 S. W. 439; *Van Gallow v. Brandt*, 168 Mich. 642, 134 N. W. 1018; *Campbell v. Clark*, 64 N. H. 328, 10 Atl. 702; *Budd v. Haines*, 52 N. J. Eq. 488, 29 Atl. 170; *In re Scott's Estate*, 163 Pa. 165, 29 Atl. 877; *In re Penney's Estate*, 159 Pa. 346, 28 Atl. 255; *Dukes v. Faulk*, 37 S. C. 255, 16 S. E. 122, 34 Am. St. Rep. 745.

²⁵ *Culp v. Lee*, 109 N. C. 675, 14 S. E. 74; *Whittle v. Whittle's Ex'rs*, 108 Va. 22, 60 S. E. 748; *Collins v. Feather's Ex'rs*, 52 W. Va. 107, 43 S. E. 323, 61 L. R. A. 660, 94 Am. St. Rep. 912; *Lynn v. Hall*, 101 Ky. 738, 43 S. W. 402, 72 Am. St. Rep. 439.

treated as a class or as individuals. In the latter case they, of course, take per capita: in the former, they take, not per stirpes, but as a unit with regard to the other beneficiary, and the portion, coming to them as a class unit, or entity, is divided among those who compose the entity.

But a tendency to favor a disposition per stirpes is sometimes disclosed by the cases.²⁶ Thus where the will provided that property should be divided between the children of two persons, share and share alike, they were held to take per stirpes, and not per capita.²⁷ So where the residuum was "to be divided equally between my brothers and sisters, and the children of deceased brothers and sisters," the distribution as regards the latter was held to be per stirpes;²⁸ and, under a devise to the children of the testatrix by name, "in equal proportions," and, in the event of either dying before the testatrix, the estate to be "divided among the survivors or their legal representatives, share and share alike," the two children of one of the daughters who died were held entitled to only their mother's share.²⁹ And it is generally agreed that in a devise to the "heirs" of an indicated person the heirs will take per stirpes, when they would thus have taken by inheritance under the statute of descent³⁰ unless the devise is expressed in words indicating a different intent, as where, after a devise to "heirs," it is added "equally," or "share and share alike."³¹ And the expressed

²⁶ "The law favors that construction of a will which will make a distribution as nearly conform to the general rule of inheritance as the language will permit, and favors equities rather than technicalities." *Rivenett v. Bourquin*, 53 Mich. 10, 18 N. W. 537, 4 Am. Prob. Rep. 264.

²⁷ *Mayer v. Hover*, 81 Ga. 308, 7 S. E. 562. See *White v. Holland*, 92 Ga. 216, 18 S. E. 17, 44 Am. St. Rep. 87.

²⁸ *Henry v. Thomas*, 118 Ind. 23, 20 N. E. 519.

²⁹ *Rivenett v. Bourquin*, 53 Mich. 10, 18 N. W. 537.

³⁰ *Healy v. Healy*, 70 Conn. 467, 39 Atl. 793; *Conklin v. Davis*, 63 Conn. 377, 28 Atl. 537; *Jackson v. Alsop*, 67 Conn. 249, 34 Atl. 1106; *Maclean v. Williams*, 116 Ga. 257, 42 S. E. 485, 59 L. R. A. 125; *Mosler v. Bowser*, 226 Ill. 46, 80 N. E. 730; *Thomas v. Miller*, 161 Ill. 60, 43 N. E. 848; *Johnson v. Bodine*, 108 Iowa, 594, 79 N. W. 348; *Cummings v. Cummings*, 146 Mass. 501, 16 N. E. 401; *Eyer v. Beck*, 70 Mich. 179, 38 N. W. 20; *Preston v. Brant*, 96 Mo. 552, 10 S. W. 78; *Kirkpatrick v. Kirkpatrick*, 197 Ill. 144, 64 N. E. 267; *Bartine v. Davis*, 60 N. J. Eq. 202, 46 Atl. 577; *Woodward v. James*, 115 N. Y. 346, 22 N. E. 150; *In re Hoch's Estate*, 154 Pa. 417, 26 Atl. 610; *Appeal of Fidelity Title & Trust Co.*, 159 Pa. 545, 28 Atl. 361; *Appeal of Alston* (Pa.) 11 Atl. 366; *In re Swinburne*, 16 R. I. 208, 14 Atl. 850; *Lott v. Thompson*, 36 S. C. 38, 15 S. E. 278; *Ross' Ex'r v. Kiger*, 42 W. Va. 402, 26 S. E. 193.

³¹ *Doherty v. Grady*, 105 Me. 36, 72 Atl. 869; *In re Griswold*, 42 Misc. Rep. 230, 86 N. Y. Supp. 250; *Mooney v. Purpus*, 70 Ohio St. 57, 70 N. E. 894; *Parrott v. Barrett*, 70 S. C. 195, 49 S. E. 563.

Heirs are sometimes held to take per stirpes notwithstanding a direction in the will that they are to "share equally." *Allen v. Boardman*, 193 Mass. 284,

intent that the members of a class shall take per stirpes controls.⁸² In fact, all the rules in this connection are merely resorted to in the absence of a certain intent on the part of the testator. That disclosed, it prevails, and rules of construction give way, or, rather, are never invoked. Thus a residue, to be equally divided among all the testator's lawful heirs, will be distributed per capita where the will contained specific bequests to his living children for the purpose of making all "to share alike up to this date."⁸³ And where there was a limitation over a life estate "to my three sons [naming them] during the term of their natural lives, and then to the children that each may have surviving them," the children were held to take per stirpes.⁸⁴

79 N. E. 260, 118 Am. St. Rep. 497; *McClench v. Waldron*, 204 Mass. 554, 91 N. E. 126; *In re Hoch's Estate*, 154 Pa. 417, 26 Atl. 610.

⁸² *Siders v. Siders*, 169 Mass. 523, 48 N. E. 277; *Jameson v. Jameson's Adm'r*, 86 Va. 51, 9 S. E. 480, 3 L. R. A. 773; *Hopkins v. Keazer*, 89 Me. 347, 36 Atl. 615; *Geery v. Skelding*, 62 Conn. 499, 27 Atl. 77.

⁸³ *Copeland v. Copeland*, 64 Ill. App. 100. *Semble*: *Bisson v. Railroad Co.*, 143 N. Y. 125, 38 N. E. 104.

⁸⁴ *Bethea v. Bethea*, 116 Ala. 265, 22 South. 561. See, also, *Succession of Allen*, 48 La. Ann. 1036, 20 South. 193, 55 Am. St. Rep. 295; *Fields v. Fields*, 93 Ky. 619, 20 S. W. 1042; *In re High's Estate*, 136 Pa. 222, 20 Atl. 421, 423; *Lockwood's Appeal*, 55 Conn. 157, 10 Atl. 517.

CHAPTER XVI

CONSTRUCTION (Continued)—NATURE AND DURATION OF INTERESTS

- 122-123. Estates in Fee.
- 124. Estates for Life.
- 125-126. Joint Tenancy and Tenancy in Common.
- 127. Interests in Personal Property.

ESTATES IN FEE

- 122. At common law a devise of land, without further indication as to the extent of the interest intended to be created, carried only a life estate.
- 123. Under nearly all modern statutes, such a devise carries all the interest which the testator has in the land, in the absence of a manifest intention on his part to dispose of a lesser interest.

At common law a devise of real estate, in order to convey the fee, must either contain words of inheritance, or in some manner the intention of the testator to pass an interest of this character must be clearly manifest.¹ The technical term "heirs" was not, however, necessary for this purpose, as in the case of deeds.² Thus a devise in fee simple,³ or to one forever,⁴ or to one and his successors, or to one and his house or family, or to a man and "his," was sufficient to pass the fee.⁵ So, if an intention to create a fee could be gathered from the whole will, such an interest would pass, even though no words of succession of any nature were used.⁶ And a condition or direction imposed on a devisee to pay a sum of money, such as the testator's debts, or legacies, enlarges the devise to him, without words of limitation; into an absolute fee;⁷ this on the ground that

¹ Little v. Giles, 25 Neb. 313, 41 N. W. 186; Wright v. Denn, 10 Wheat. (U. S.) 204, 6 L. Ed. 303.

² Snodgrass v. Brandenburg, 164 Ind. 59, 71 N. E. 137, 72 N. E. 1030; Roth v. Rauschenbusch, 173 Mo. 582, 73 S. W. 664, 61 L. R. A. 455.

³ Baker v. Raimond, 2 Jar. Wills, 253.

⁴ Idle v. Cooke, 2 Ld. Ray. 1144, 1152.

⁵ 2 Jar. Wills (Big. Ed.) 283, 284.

⁶ Bromley v. Gardner, 79 Me. 246, 9 Atl. 621; McCaffrey v. Manogue, 196 U. S. 563, 25 Sup. Ct. 319, 49 L. Ed. 600.

⁷ Parsons v. Millar, 189 Ill. 107, 59 N. E. 606; McFarland v. McFarland, 177 Ill. 208, 52 N. E. 281; Korf v. Gerichs, 145 Ind. 134, 44 N. E. 24; Donohue v. Donohue, 54 Kan. 136, 37 Pac. 998; Potts v. Kline, 174 Pa. 513, 34 Atl. 191.

The rule, however, has no application when the estate of the devisee is de-

he might otherwise incur loss by having to pay more than he would receive, it being the presumed intent of the testator to benefit the devisee beyond all question; hence the disparity between the charge and the value of the estate devised is immaterial, so long as there is even a remote possibility of loss.⁸ The presumption of an intent to give a fee, under such circumstances, is not, however, conclusive.⁹ A devise on condition that the devisee shall convey other lands, in which he has an interest, to third persons, will carry a fee.¹⁰ So a devise over in a particular event is regarded as enlarging a general devise so as to carry a fee,¹¹ as raising an implication that it shall abide with the devisee in all other contingencies.¹² And the use of the words "estate, property, real effects," etc., when they refer to interests, and not to the matter in which the interests exist, will pass whatever interest the testator may have therein.¹³ So, also, a devise in fee, in trust for another, without any words of limitation, will make the equitable estate coextensive with that of the trustee.¹⁴ So a trustee will be regarded as having the fee, when such estate is necessary to effectuate the trusts, though there be no words of limitation.¹⁵ And when the same words are used to pass both real and personal property they will be construed to convey the same estate in each.¹⁶

The word "heirs" is, of course, the usual and proper term to be employed in creating an estate in fee,¹⁷ and this word will be con-

fined by the will. *Couch v. Eastham*, 29 W. Va. 784, 3 S. E. 23. Nor when an estate is limited over. *Brooks v. Kip*, 54 N. J. Eq. 462, 35 Atl. 658.

⁸ 2 Jar. Wills, 248.

⁹ *Lithgow v. Kavenagh*, 9 Mass. 165.

¹⁰ *Gibson v. Horton*, 5 Har. & J. (Md.) 177.

¹¹ *Doe v. Coleman*, 6 Price, 179.

Devise of remainder. "Where land is devised to one for life and over to another, especially to a son, without words of limitation, or any further words to express his intent, such a devise over is construed to be a fee." *Plimpton v. Plimpton*, 12 Cush. (Mass.) 458, 463.

¹² 2 Redf. Wills, 324.

¹³ *Reeves v. Winnington*, 3 Mod. 45; *Macaree v. Tall*, Amb. 18; *Pettward v. Prescott*, 7 Ves. 541, 546; *Chichester v. Oxendon*, 4 Taunt. 176; *Bailis v. Gale*, 2 Ves. 48; *Randall v. Tuclim*, 6 Taunt. 410.

¹⁴ *Challenger v. Sheppard*, 8 T. R. 597; *Knight v. Selby*, 3 M. & Gr. 92; *Moore v. Cleghorn*, 10 Beav. 423; *Hodson v. Ball*, 14 Sim. 558; *Hutchinson v. Stephens*, 1 Keen, 240.

¹⁵ *Shaw v. Welgh*, 2 Str. 798.

¹⁶ *Mulvane v. Rude*, 146 Ind. 476, 45 N. E. 659.

¹⁷ *Connor v. Gardner*, 230 Ill. 258, 82 N. E. 640, 15 L. R. A. (N. S.) 73; *Reddick v. Lord*, 131 Ind. 336, 30 N. E. 1085; *Hochstedler v. Hochstedler*, 108 Ind. 506, 9 N. E. 467; *McMeekin v. Smith* (Ky.) 21 S. W. 353; *Young v. Kinhead's Adm'r*, 101 Ky. 252, 40 S. W. 776; *Smith v. Rice*, 183 Mass. 251, 66 N. E. 806; *Passman v. Safe Deposit Co.*, 57 N. J. Eq. 273, 41 Atl. 953; *Stigers v. Dins-*

strued as one of limitation, and not of purchase, in the absence of a plain intent to use it in the latter sense. Thus a devise to a daughter, for her benefit during life, "it to be and remain the property of the heirs of her body after her death,"¹⁸ or to a wife and son, and over if "no heirs to them be left,"¹⁹ or to a son, to have the income for life, the property "at his death to descend to his heirs,"²⁰ or to one "and so to his heirs and assigns forever,"²¹ or to a married woman free from the control or interference of her husband, and to her heirs,²² all pass estates in fee simple to the first taker. But the intention controls, and a devise to two for life, remainder "to go to their heirs forever," was held to create merely a life estate in the first takers.²³ When a devise is made to a person and his children, the latter word is treated as one of limitation, if the devisee had no children at the death of the testator, and children born thereafter take no interest under the will.²⁴ But if children are living at the time of the testator's death or at the date of the will, the word is then treated as one of purchase,²⁵ unless the intention of the testator is manifestly otherwise.²⁶ So a devise to a married daughter "and her lineage" creates a fee in the daughter.²⁷ When the language of a devise covers an interest greater than that held by the devisor, it is effectual to pass such interest as he had.²⁸

more, 193 Pa. 482, 44 Atl. 550, 74 Am. St. Rep. 702; *Gilchrist v. Empfield*, 194 Pa. 397, 45 Atl. 46; *Lloyd v. Mitchell*, 130 Pa. 205, 18 Atl. 599.

¹⁸ *Wilkerson v. Clark*, 80 Ga. 367, 7 S. E. 319, 12 Am. St. Rep. 258 (where estate tail not recognized). *Semble*: *Kendall v. Clapp*, 163 Mass. 69, 39 N. E. 773.

¹⁹ *Hennegar v. Deadrick* (Tenn. Ch. App.) 54 S. W. 138; *Reimer v. Reimer*, 192 Pa. 571, 44 Atl. 316, 73 Am. St. Rep. 833.

²⁰ *Curry v. Patterson*, 183 Pa. 238, 38 Atl. 594; *Georgia, C. & N. Ry. Co. v. Archer*, 87 Ga. 237, 13 S. E. 636. *Semble*: *Harris v. McCann*, 75 Miss. 805, 23 South. 631.

²¹ *Keniston v. Adams*, 80 Me. 290, 14 Atl. 203.

²² *Cressey v. Wallace*, 66 N. H. 566, 29 Atl. 842. See, also, *Roberts v. Crume* (1903) 173 Mo. 572, 73 S. W. 662.

²³ *Leake v. Watson*, 60 Conn. 498, 21 Atl. 1075 (where rule in *Shelley's Case* abolished by statute).

²⁴ *Lofton v. Murchison*, 80 Ga. 391, 7 S. E. 322; *Rothwell v. Jamison*, 147 Mo. 601, 49 S. W. 503; *Silliman v. Whitaker*, 119 N. C. 89, 25 S. E. 742.

²⁵ *Lord v. Moore*, 20 Conn. 122; *Hoyle v. Jones*, 35 Ga. 40, 89 Am. Dec. 273; *Allen v. Hoyt*, 5 Metc. (Mass.) 324; *Fitzpatrick v. Fitzpatrick*, 100 Va. 552, 42 S. E. 306, 93 Am. St. Rep. 976.

²⁶ *Wood v. Baron*, 1 East, 259; *Tyrone v. Waterford*, 1 De G., F. & J. 613. As where a gift is to a person and "his children forever," *Hood v. Dawson*, 98 Ky. 285, 33 S. W. 75; or where a devise is to a "sister and at her death to her children or other lineal descendants," *Mason v. Ammon*, 117 Pa. 127, 11 Atl. 449.

²⁷ *Lockett v. Lockett*, 94 Ky. 289, 22 S. W. 224.

²⁸ *Crosgrove v. Crosgrove*, 69 Conn. 416, 38 Atl. 219.

Rule under Statute

The common law presumption that nothing more than a life estate passed under a devise in the absence of a testamentary intent to the contrary has been very generally ²⁹ replaced by the statutory rule that all the testator's interest shall pass in the absence of a clear testamentary intent to the contrary. Thus a devise of real estate to a wife, with power to sell "as she may deem best for her own personal benefit and for my children," ³⁰ or to use and manage as she saw fit, ³¹ or the "allowance of one-third my property" to the widow, ³² or to a daughter for life, with executory devise over, upon her death without issue, ³³ or "to my brother for the benefit of himself and his family," ³⁴ or a devise of property to a wife "for a home," ³⁵ or to a wife, "and if she ever wants to leave she is to let" a certain person have it in trust for his children, ³⁶ all create fees simple in the first taker. Where, under the statute, the will has clearly given a fee in the realty, the testator is not presumed to have intended by subsequent expressions to reduce the estate, unless an intention to this end is wholly clear. ³⁷ Thus a will giving the testator's wife the whole of his estate, without limitation, does not disclose a purpose

²⁹ *Smith v. Greer*, 88 Ala. 416, 6 South. 911; *Hitch v. Patten*, 8 Houst. (Del.) 334, 16 Atl. 558, 2 L. R. A. 724; *Horn v. Foley*, 13 App. D. C. 184; *Bowlin v. White*, 244 Ill. 623, 91 N. E. 658; *Mills v. Franklin*, 128 Ind. 444, 28 N. E. 60; *Morgan v. McNeeley*, 126 Ind. 537, 26 N. E. 395; *Boston Safe Deposit & Trust Co. v. Stich*, 61 Kan. 474, 59 Pac. 1082; *Harlow v. Scobee's Adm'r* (Ky.) 60 S. W. 861; *Hutchins v. Pearce*, 80 Md. 434, 31 Atl. 501; *Goodwin v. McDonald*, 153 Mass. 481, 27 N. E. 5; *Pennington v. Pennington*, 70 Md. 418, 17 Atl. 329, 3 L. R. A. 816; *Johnson v. Planting Co.*, 77 Miss. 15, 26 South. 360; *Cook v. Couch*, 100 Mo. 29, 13 S. W. 80; *Steward v. Knight*, 62 N. J. Eq. 232, 49 Atl. 535; *Sayles v. Best*, 140 N. Y. 368, 35 N. E. 636; *Dilworth v. Gusk*, 131 Pa. 343, 18 Atl. 899; *MacConnell v. Wright*, 150 Pa. 275, 24 Atl. 517; *Webster v. Wiggin*, 19 R. I. 73, 31 Atl. 824, 28 L. R. A. 510; *Howze v. Barber*, 29 S. C. 466, 7 S. E. 817; *May v. Town Site Co.*, 83 Tex. 502, 18 S. W. 959; *Dulin v. Moore* (Tex. Civ. App.) 69 S. W. 94; *Reeves v. School Dist.*, 24 Wash. 282, 64 Pac. 752; *Morrison v. Coke Co.*, 52 W. Va. 331, 43 S. E. 102; *Mosby v. Paul's Adm'r*, 88 Va. 533, 14 S. E. 336.

³⁰ *Brown v. Perry*, 51 App. Div. 11, 64 N. Y. Supp. 402. Semble: *Snyder v. Baer*, 144 Pa. 278, 22 Atl. 897, 13 L. R. A. 359.

³¹ *In re Barrett's Will*, 111 Iowa, 570, 82 N. W. 998.

³² *White v. Commonwealth*, 110 Pa. 90, 1 Atl. 33. Semble: *Schult v. Moll*, 132 N. Y. 122, 30 N. E. 377.

³³ *Kelly v. Williams*, 113 N. C. 437, 18 S. E. 693 (held to vest a fee in the daughter, upon her marrying and having issue).

³⁴ *Holder v. Holder*, 40 App. Div. 255, 59 N. Y. Supp. 204. Semble: *Crain v. Wright*, 114 N. Y. 307, 21 N. E. 401.

³⁵ *Wilkinson v. Chambers*, 181 Pa. 437, 37 Atl. 569.

³⁶ *Johnson v. Johnson*, 48 S. C. 408, 26 S. E. 722.

³⁷ *Wallace v. Hawes*, 79 Me. 177, 8 Atl. 885; *Schmauns v. Goss*, 132 Mass. 141; *Clay v. Wood*, 153 N. Y. 134, 47 N. E. 274.

not to give her a fee by the words, "When she is done with it, I give to * * * Church * * * \$1,000."³⁸ And where there is a primary gift of property in fee, with a gift over on the happening of a definite event, the first devise will be construed to pass a defeasible fee, subject to be defeated by the happening of the event, rather than as cut down to a life estate,³⁹ unless a contrary intention appears.⁴⁰ So the subsequent expression of a mere wish or desire will not reduce a prior absolute estate to an estate for life.⁴¹ So an estate given, without words of limitation, and subsequently burdened with a trust in favor of the testator's children, is not thereby reduced to an estate for life, but the beneficiary takes the fee, subject to the trust.⁴²

But, in all cases, the clearly demonstrated intent of the testator controls.⁴³ Thus a gift of the income of land to a daughter until she reached a certain age, she then to have full control and management thereof, with remainder on her death to other devisees, creates a life estate only in the daughter.⁴⁴ So a gift of one-third of the net income of certain property to the testator's widow, upon her death the joint administration of the whole estate to be continued by the children, did not vest a fee in one-third in the widow;⁴⁵ neither did a devise to her for the support and maintenance of herself and children, with limitation over to the children upon her death;⁴⁶ and a devise to a nephew of "all my real estate to hold

³⁸ *Cox v. Anderson's Adm'r* (Ky.) 70 S. W. 839.

³⁹ *Steward v. Knight*, 62 N. J. Eq. 232, 49 Atl. 535; *Giles v. Anslow*, 128 Ill. 187, 21 N. E. 225; *Boling v. Miller*, 133 Ind. 602, 33 N. E. 354; *Mitchell v. Campbell*, 94 Ky. 347, 22 S. W. 549; *Webster's Trustee v. Webster* (Ky.) 22 S. W. 920; *Backus v. Association*, 77 Md. 50, 25 Atl. 856; *Benson v. Linthicum*, 75 Md. 141, 23 Atl. 133; *Moffat v. Cook*, 150 Mass. 529, 23 N. E. 236; *Mitchell v. Railway Co.*, 165 Pa. 645, 31 Atl. 67; *Keating v. McAdoo*, 180 Pa. 5, 36 Atl. 218; *Appeal of Solicitors' Loan & Trust Co.*, 140 Pa. 253, 21 Atl. 317; *Barney v. Arnold*, 15 R. I. 78, 23 Atl. 45; *In re Johnson*, 23 R. I. 111, 49 Atl. 695; *Williamson v. Tunis*, 107 Tenn. 83, 64 S. W. 10.

⁴⁰ *King v. Frick*, 135 Pa. 575, 19 Atl. 951, 20 Am. St. Rep. 889.

⁴¹ *Mitchell v. Mitchell*, 143 Ind. 113, 42 N. E. 465; *Taylor v. Brown*, 88 Me. 56, 33 Atl. 664; *Clay v. Wood*, 91 Hun, 398, 36 N. Y. Supp. 317; *Ahl v. Bosler*, 175 Pa. 526, 34 Atl. 805; *In re Bellas' Estate*, 176 Pa. 122, 34 Atl. 1003; *In re Heck's Estate*, 170 Pa. 232, 32 Atl. 413; *Tabor v. Tabor*, 85 Wis. 313, 55 N. W. 702; *Conlin v. Sowards*, 129 Wis. 320, 109 N. W. 91.

⁴² *Forbes v. Darling*, 94 Mich. 621, 54 N. W. 385.

⁴³ *Griffiths v. Griffiths*, 198 Ill. 632, 64 N. E. 1069; *Morrison v. Schorr*, 197 Ill. 554, 64 N. E. 545; *In re Nevins' Estate*, 192 Pa. 258, 43 Atl. 996.

⁴⁴ *Healy v. Eastlake*, 152 Ill. 424, 39 N. E. 260.

⁴⁵ *In re Steinmetz's Estate*, 168 Pa. 171, 31 Atl. 1070.

⁴⁶ *Trout v. Rominger*, 198 Pa. 91, 47 Atl. 960; *Summers v. Higley*, 191 Ill. 193, 60 N. E. 969. So with a devise "to my wife, to have so long as she remains my widow; should she remarry, then the law is my will." *In re*

as his own, then to his heirs if any, if not, to his nearest akin" of a certain name, was held to vest in the nephew a life estate only.⁴⁷

Estate in Fee—Void Limitation Over

Where a will creates an absolute estate in fee simple, a subsequent clause, which cannot be construed as effecting a change in the nature of the estate by curtailment or reduction, but which attempts a further limitation upon the absolute estate already devised, is void, inasmuch as the prior fee simple involves absolute dominion over the land by the devisee, with which any further control by the testator is incompatible. This principle is concretely recognized and applied in many cases.⁴⁸ Thus where a gift of the whole estate to a wife "absolutely and forever" was followed by a provision that if any of the property remained undisposed of it should go to certain relatives, the attempted disposition over was void, and the relatives took nothing.⁴⁹ So where the testator devised certain land to A. and his heirs, subsequently providing that on A.'s death without heirs of his body the property should go over, the limitation over was held void, as inconsistent with the prior fee,⁵⁰ and so where

Brooks' Will, 125 N. C. 136, 34 S. E. 265. Semble: *Bennett v. Packer*, 70 Conn. 357, 39 Atl. 739, 66 Am. St. Rep. 112.

⁴⁷ *Miller v. Lamprey*, 68 N. H. 376, 44 Atl. 528.

⁴⁸ *Terrell v. Reeves*, 103 Ala. 264, 16 South. 54; *Bernstein v. Bramble* (1907) 81 Ark. 480, 99 S. W. 682, 8 L. R. A. (N. S.) 1028, 11 Ann. Cas. 343, citing *Gardner on Wills*; *Dalrymple v. Leach*, 61 N. E. 443, 192 Ill. 51; *Lambe v. Drayton*, 182 Ill. 110, 55 N. E. 189; *Howe v. Hodge*, 152 Ill. 252, 38 N. E. 1083; *O'Boyle v. Thomas*, 116 Ind. 243, 19 N. E. 112; *Hammond v. Croxton* (Ind. App.) 61 N. E. 596; *Langman v. Marbe*, 156 Ind. 330, 58 N. E. 191; *Mulvane v. Rude*, 146 Ind. 476, 45 N. E. 659; *Brewster v. Douglas* (Iowa) 80 N. W. 304; *Garrard v. Kendall* (Ky. 1909) 121 S. W. 997; *Johnson v. Whiton*, 159 Mass. 424, 34 N. E. 542; *Cushing v. Spalding*, 164 Mass. 287, 41 N. E. 297; *Loosing v. Loosing*, 85 Neb. 66, 122 N. W. 707, 25 L. R. A. (N. S.) 920; *Dodson v. Sevars*, 52 N. J. Eq. 611, 30 Atl. 477; *Banzer v. Banzer*, 156 N. Y. 429, 51 N. E. 291; *Felt v. Richards*, 64 N. J. Eq. 16, 53 Atl. 824; *Patterson v. Madden*, 54 N. J. Eq. 714, 36 Atl. 273; *Homet v. Bacon*, 126 Pa. 176, 17 Atl. 584; *Fenstermaker v. Holman* (Ind. App.) 61 N. E. 599; *Kaufman v. Burgert*, 195 Pa. 274, 45 Atl. 725, 78 Am. St. Rep. 813; *Bowen v. Bowen*, 87 Va. 438, 12 S. E. 885, 24 Am. St. Rep. 664; *Shaw v. Erwin*, 41 S. C. 209, 19 S. E. 499. Contra: *Ilmas v. Neldt*, 101 Iowa, 348, 70 N. W. 203.

⁴⁹ *Roth v. Rauschenbusch*, 173 Mo. 582, 73 S. W. 664, 61 L. R. A. 455. Accord: *Halliday v. Stickler*, 78 Iowa, 388, 43 N. W. 228; *McNutt v. McComb*, 61 Kan. 25, 58 Pac. 965; *Evans v. Smith*, 166 Pa. 625, 31 Atl. 346; *Pierce v. Simmons*, 16 R. I. 689, 19 Atl. 242; *Leggett v. Flrth*, 53 Hun, 152, 6 N. Y. Supp. 158; *Trustees of Central Methodist Episcopal Church v. Harris*, 62 Conn. 93, 25 Atl. 456; *Moran v. Moran*, 143 Mich. 322, 106 N. W. 206, 5 L. R. A. (N. S.) 323, 114 Am. St. Rep. 648; *Bradley v. Carnes*, 94 Tenn. 27, 27 S. W. 1007, 45 Am. St. Rep. 696; *Banzer v. Banzer*, 11 Misc. Rep. 310, 32 N. Y. Supp. 266.

⁵⁰ *Ewing v. Barnes*, 156 Ill. 61, 40 N. E. 325; *Burton v. Gagnon*, 180 Ill. 345, 54 N. E. 279; *Galligan v. McDonald*, 200 Mass. 299, 86 N. E. 304, 128 Am. St. Rep. 421. So with a subsequent provision appointing a trustee to control

there was a limitation in event of the first taker in fee not selling the land to a certain person.⁵¹ For the same reason an attempted restraint upon the alienation of an estate given in fee is void,⁵² as where a fee is given, with the provision that the devisee should not "have power to sell, but may leave the same to her children."⁵³ The principle has, of course, no application to a qualified fee.⁵⁴

General Devise, with Power of Disposition

Where a devise is made in general terms, without specifically indicating the extent of the interest, and the gift is coupled with an unconditional power of disposition in the devisee, the latter is regarded as taking an estate in fee,⁵⁵ and any limitation over is void.⁵⁶ But a power to dispose of the property with the consent of another,⁵⁷ or a power to dispose of the property by will,⁵⁸ does not

the property for the lives of the persons to whom it had already been given in fee. *Dulin v. Moore* (Tex. Civ. App.) 69 S. W. 94.

⁵¹ *Rea v. Bell*, 147 Pa. 118, 23 Atl. 349.

⁵² *Allen v. Craft*, 109 Ind. 476, 9 N. E. 919, 58 Am. Rep. 425; *Goldsmith v. Petersen*, 159 Iowa, 692, 141 N. W. 60; *Mandlebaum v. McDonell*, 29 Mich. 78, 18 Am. Rep. 61; *Turner v. Savings Institution*, 76 Me. 527; *Manierre v. Welling* (1911) 32 R. I. 104, 78 Atl. 507, Ann. Cas. 1912C, 1311.

⁵³ *McIntyre v. McIntyre*, 123 Pa. 329, 16 Atl. 783, 10 Am. St. Rep. 529.

⁵⁴ *Godwin v. Banks*, 87 Md. 425, 40 Atl. 268.

⁵⁵ *Muhlke v. Tiedemann*, 177 Ill. 606, 52 N. E. 843; *Rogers v. Winklespleck*, 143 Ind. 373, 42 N. E. 746; *Robbins' Ex'r v. Robbins* (Ky.) 9 S. W. 254; *Constantine v. Moore* (Ky.) 62 S. W. 1016; *Smith v. Smith* (Ky. 1903) 72 S. W. 766; *Barnett v. Barnett*, 117 Md. 265, 83 Atl. 160, Ann. Cas. 1913E, 1284; *Veeder v. Meader*, 157 Mass. 413, 32 N. E. 358; *Clusky v. Burns*, 120 Mo. 567, 25 S. W. 585; *Knight v. Knight*, 162 Mass. 460, 38 N. E. 1131; *Foster v. Smith*, 156 Mass. 379, 31 N. E. 291; *Loosing v. Loosing*, 85 Neb. 66, 122 N. W. 707, 25 L. R. A. (N. S.) 920; *Rodenfels v. Schumann*, 45 N. J. Eq. 383, 17 Atl. 688; *Kiefel v. Keppler*, 173 Pa. 181, 33 Atl. 1043; *GOOD v. FICHTHORN*, 144 Pa. 287, 22 Atl. 1032, 27 Am. St. Rep. 630, Dunmore Cas. Wills, 250; *Bank of Charleston v. Dowling*, 52 S. C. 345, 29 S. E. 788; *Wooten v. Reed* (Tenn. Ch. App.) 53 S. W. 991; *Crutchfield v. Greer*, 113 Va. 232, 74 S. E. 166.

An undefined power to sell means power to sell in fee. *Henninger v. Henninger*, 202 Pa. 207, 51 Atl. 749; *Roberts v. Lewis*, 153 U. S. 367, 14 Sup. Ct. 945, 38 L. Ed. 747.

⁵⁶ *Wolfer v. Hemmer*, 144 Ill. 554, 33 N. E. 751; *Cameron v. Parish*, 155 Ind. 329, 57 N. E. 547; *Hammond v. Croxton* (Ind. App.) 61 N. E. 596; *Logan v. Sills*, 28 Ind. App. 170, 62 N. E. 459; *Hambel v. Hambel*, 109 Iowa, 459, 80 N. W. 528; *Law v. Douglass*, 107 Iowa, 606, 78 N. W. 212; *Clay v. Chenault*, 108 Ky. 77, 55 S. W. 729; *Barth v. Barth* (Ky.) 38 S. W. 511; *Lord v. Pearson*, 103 Me. 565, 83 Atl. 1102; *Benz v. Fabian*, 54 N. J. Eq. 615, 35 Atl. 760; *McClellan v. Larchar*, 45 N. J. Eq. 17, 16 Atl. 269; *Griswold v. Warner*, 51 Hun, 12, 3 N. Y. Supp. 688; *In re Gardner*, 140 N. Y. 122, 35 N. E. 439; *In re Jones*, 67 Law J. Ch. 211, 1 Ch. 438, 78 Law T. (N. S.) 74. See, however, *Gibson v. Gibson* (1912) 239 Mo. 490, 144 S. W. 770.

⁵⁷ *Greffet v. Willman*, 114 Mo. 106, 21 S. W. 459.

⁵⁸ *Kellers v. Kellers* (1912) 79 N. J. Eq. 412, 82 Atl. 94; *Morris v. Le Bel*, 71 N. J. Eq. 43, 63 Atl. 501.

give the first taker a fee as against a remainderman, and, in some cases, a limitation over is held to reduce what would otherwise be a fee to an estate for life, with power to sell, in consequence of which the limitation is good, if not defeated by the exercise of the power.⁵⁹

A devise for the support of the devisee and the testator's children, with general power of disposition, is not so unqualified as to avoid a limitation over.⁶⁰ But in no event do the devisees over take any rights in the property as against grantees under a properly exercised power of sale, given to the first taker.⁶¹

Base or Qualified Fee

An estate of this character, sometimes termed by the courts a conditional fee, may be created by will as well as by deed,⁶² as in a devise to a daughter, and over to the testator's grandchildren, if she died before either of them,⁶³ or to a daughter, then to such of her children as she may leave surviving,⁶⁴ or to children, defeasible on their death prior to that of the widow⁶⁵ or to a wife with gift over if she remarries.⁶⁶ So a devise to a son for life, with no disposition over except in case the son die without issue, is thereby enlarged to a fee, on issue being born to him, determinable on his dying without issue.⁶⁷ Far the most numerous class of cases is where an estate is given in fee, defeasible upon the taker's dying without heirs or children or issue. Here a limitation over takes effect as an executory devise.⁶⁸

⁵⁹ Gruenewald v. Neu, 215 Ill. 132, 74 N. E. 101. See Kent v. Morrison, 153 Mass. 137, 26 N. E. 427, 10 L. R. A. 756, 25 Am. St. Rep. 616; Kellers v. Kellers, 80 N. J. Eq. 441, 85 Atl. 340; Fecht v. Henze (1910) 162 Mich. 52, 127 N. W. 26; In re Tyson's Estate, 191 Pa. 218, 43 Atl. 131; Spaan v. Anderson, 115 Iowa, 121, 88 N. W. 200.

No really satisfactory reason has been given for the prevailing view that a gift of land in general terms coupled with an unrestricted power of alienation cannot be cut down by an executory devise over. Such a rule frequently defeats the intention of testator and is not rendered necessary on any ground of policy. For a careful discussion of this question, see Gray, *Restraints on Alienation* (2d Ed.) § 74.

⁶⁰ Gordon v. Gordon (Tenn. Ch. App.) 46 S. W. 357; King v. Bock, 80 Tex. 156, 15 S. W. 804. Compare Speyer v. McNamara's Adm'r, 144 Ky. 774, 139 S. W. 1092.

⁶¹ Hovey v. Walbank, 100 Cal. 192, 34 Pac. 650.

⁶² Corey v. Springer, 138 Ind. 506, 37 N. E. 322; Burden v. Lipsitz, 166 N. C. 523, 82 S. E. 863.

⁶³ Pulse v. Osborn, 80 Ind. App. 631, 64 N. E. 59.

⁶⁴ Harrison v. Weatherby, 180 Ill. 418, 54 N. E. 237.

⁶⁵ Corey v. Springer, 138 Ind. 506, 37 N. E. 322.

⁶⁶ Becker v. Becker, 206 Ill. 53, 69 N. E. 49.

⁶⁷ Nott v. Fitzgibbon, 107 Tenn. 54, 64 S. W. 26.

⁶⁸ Newsom v. Holesapple, 101 Ala. 682, 15 South. 644; Gay v. Dibble, 72 Conn. 590, 45 Atl. 359; Matthews v. Hudson, 81 Ga. 120, 7 S. E. 286, 12 Am.

Rule in Shelley's Case

According to the rule in Shelley's Case,⁶⁹ when the ancestor, by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, the word "heirs" is a word of limitation of the estate, and not of purchase. This rule of property, well settled at common law, but wholly indefensible under modern conditions, whatever may be said historically in its defense, still prevails in a number of jurisdictions.⁷⁰ The rule applies to a devise giving a life estate to the ancestor, and the remainder to the heirs, where it does not appear that the word "heirs" is used in any other than its legal sense, without regard to the intention of the testator,⁷¹ and notwithstanding his expressed intent that the ancestor should have only a life estate,⁷² facts which find illustration in numerous cases.⁷³ And the word "issue" has been held equiva-

St. Rep. 305; *Daniel v. Daniel*, 102 Ga. 181, 28 S. E. 167; *Koeffler v. Koeffler*, 185 Ill. 261, 56 N. E. 1094; *Lombard v. Witbeck*, 173 Ill. 396, 51 N. E. 61; *Bradsby v. Wallace* (1903) 202 Ill. 239, 66 N. E. 1088; *Summers v. Smith*, 127 Ill. 645, 21 N. E. 191; *Teal v. Richardson* (1903) 160 Ind. 119, 66 N. E. 435; *Pate v. French*, 122 Ind. 10, 23 N. E. 673; *Jordan v. Hinkle*, 111 Iowa, 43, 82 N. W. 426; *Wells v. Offutt* (Ky.) 53 S. W. 530; *Collins v. Thompson* (Ky.) 43 S. W. 227; *Dorsey's Committee v. Maddox*, 103 Ky. 253, 44 S. W. 632; *Harper v. Baird* (Ky.) 35 S. W. 638; *Anderson v. Brown*, 84 Md. 261, 35 Atl. 937; *Welch v. Brimmer*, 169 Mass. 204, 47 N. E. 699; *Dunlap v. Fant*, 74 Miss. 197, 20 South. 874; *Gannon v. Pauk*, 200 Mo. 75, 98 S. W. 471; *In re Barrett's Estate*, 85 Neb. 337, 123 N. W. 299, 27 L. R. A. (N. S.) 1047; *Brooks v. Kip*, 54 N. J. Eq. 462, 35 Atl. 658; *Steward v. Knight*, 62 N. J. Eq. 232, 49 Atl. 535; *In re New York, L. & W. Ry. Co.*, 105 N. Y. 89, 11 N. E. 492, 59 Am. Rep. 478; *Morehouse v. Morehouse*, 161 N. Y. 654, 57 N. E. 1118; *Durfee v. MacNeill*, 58 Ohio St. 238, 50 N. E. 721; *Stoner v. Wunderlich*, 198 Pa. 158, 47 Atl. 945; *Powers v. Bullwinkle*, 33 S. C. 293, 11 S. E. 971; *Thomson v. Peake*, 38 S. C. 440, 17 S. E. 45, 725; *First Nat. Bank v. De Pauw* (C. O.) 75 Fed. 775; *Dent v. Pickens*, 61 W. Va. 488, 58 S. E. 1029.

⁶⁹ 1 Coke, 94b.

⁷⁰ *Winter v. Dibble*, 251 Ill. 200, 95 N. E. 1093; *Teal v. Richardson*, 160 Ind. 119, 66 N. E. 435; *Wool v. Fleetwood*, 136 N. C. 460, 48 S. E. 785, 67 L. R. A. 444; *Steel v. Linn*, 232 Pa. 18, 81 Atl. 92; *Seay v. Cockrell* (1909) 102 Tex. 280, 115 S. W. 1160.

⁷¹ *Lippincott v. Davis*, 59 N. J. Law, 241, 28 Atl. 587; *Ahl v. Liggett*, 246 Pa. 246, 92 Atl. 202.

The rule does not apply where it appears that testator used the word "heirs" as meaning children. *Rowe v. Moore*, 89 S. C. 561, 72 S. E. 468.

⁷² *Van Olinda v. Carpenter*, 127 Ill. 42, 19 N. E. 868, 2 L. R. A. 455, 11 Am. St. Rep. 92; *Leonard v. Leister*, 233 Pa. 475, 82 Atl. 753.

A "loan" to one for life, with a devise over to his heirs at his death, passes the fee where the rule in Shelley's Case obtains. *Robeson v. Moore*, 168 N. C. 388, 84 S. E. 351, L. R. A. 1915D, 496.

⁷³ *Holt v. Pickett*, 111 Ala. 362, 20 South. 432 ("to be equally divided between the heirs of the body" of the first taker); *Sims v. Georgetown College*, 1 App. D. C. 72 (to the heirs, "share and share alike"); *Silva v. Hopkinson*, 158

lent to "heirs" for this purpose;⁷⁴ so, also, with "nearest heirs."⁷⁵ When a devisee takes a fee under this rule, a devise over in event of failure of issue is invalid.⁷⁶ But the rule does not apply when a remainder in the legal estate is limited to the heirs over an equitable life estate,⁷⁷ nor where the remainder is limited to certain heirs only,⁷⁸ or to children,⁷⁹ or to "issue," when the word is used as meaning children.⁸⁰ In Indiana, while recognized, it is said that the rule will not be allowed to defeat the plain intention of the testa-

Ill. 386, 41 N. E. 1013 (accord); *Vangieson v. Henderson*, 150 Ill. 119, 36 N. E. 974; *Hageman v. Hageman*, 129 Ill. 164, 21 N. E. 814 ("to their heirs after them"); *Teal v. Richardson* (1903) 160 Ind. 119, 66 N. E. 435; *Bonner v. Bonner*, 28 Ind. App. 147, 62 N. E. 497; *Perkins v. McConnell*, 136 Ind. 384, 36 N. E. 121 ("to lawful heirs"); *Leathers v. Gray*, 101 N. C. 162, 7 S. E. 657, 9 Am. St. Rep. 30 ("to the begotten heirs or heiresses" of the first taker); *Shoup v. De Long*, 190 Pa. 331, 42 Atl. 680 ("after his death, to his heirs and legal representatives"); *Little's Appeal*, 117 Pa. 14, 11 Atl. 520; *Bassett v. Hawk*, 118 Pa. 94, 11 Atl. 802; *Henderson v. Walthour* (Pa.) 15 Atl. 893; *Reutter v. McCall*, 192 Pa. 77, 43 Atl. 398; *Serfass v. Serfass*, 190 Pa. 484, 42 Atl. 888 ("to her heirs or next of kin"); *McCann v. Barclay*, 204 Pa. 214, 53 Atl. 767; *Hiester v. Yerger*, 166 Pa. 445, 31 Atl. 122 ("unto his then surviving heirs"); *Eby v. Shank*, 196 Pa. 426, 46 Atl. 495; *Simms v. Buist*, 52 S. C. 554, 30 S. E. 400; *Brown v. Bryant*, 17 Tex. Civ. App. 454, 44 S. W. 399; *Grant v. Squire*, 2 Ont. Law Rep. 131.

⁷⁴ *Grimes v. Shirk*, 169 Pa. 74, 32 Atl. 113; *Armstrong v. Michener*, 160 Pa. 21, 28 Atl. 447. Contra: *Boykin v. Ancrum*, 28 S. C. 486, 6 S. E. 305, 13 Am. St. Rep. 608. But not when limitation is to "surviving issue." *Hill v. Giles*, 201 Pa. 215, 50 Atl. 758.

Where entails have not been abolished, a devise to A. for life and remainder to his issue would create an estate tail. *Doe d. Cannon v. Rucastle*, 8 C. B. (65 E. C. L.) 876.

⁷⁵ *Ryan v. Allen*, 120 Ill. 648, 12 N. E. 65.

The words "nearest blood relatives" are not synonymous with "heirs," so as to pass a fee in a devise to A. for life and then to his "nearest blood relatives." *Miller v. Harding*, 167 N. C. 53, 83 S. E. 25.

⁷⁶ *Travers v. Wallace*, 93 Md. 507, 49 Atl. 415.

⁷⁷ *Appeal of Reading Trust Co.*, 133 Pa. 342, 19 Atl. 552; *Howard v. Trustees*, 88 Md. 292, 41 Atl. 156; *Gadsden v. Desportes*, 39 S. C. 131, 17 S. E. 706; *Vogt v. Graff*, 222 U. S. 404, 32 Sup. Ct. 134, 56 L. Ed. 249.

⁷⁸ *In re Kuntzleman's Estate*, 136 Pa. 142, 20 Atl. 645, 20 Am. St. Rep. 909; *McCann v. McCann*, 197 Pa. 452, 47 Atl. 743, 80 Am. St. Rep. 846; *Jones v. Jones*, 201 Pa. 548, 51 Atl. 362 (to "nearest male heirs"); *Foxwell v. Van Grutten*, 78 Law T. (N. S.) 231.

So the rule is not applicable where devise is to one for life with remainder "to his lawful heirs, born of his wife." *Thompson v. Crump*, 138 N. C. 32, 50 S. E. 457, 107 Am. St. Rep. 514.

⁷⁹ *Connor v. Gardner*, 230 Ill. 258, 82 N. E. 640, 15 L. R. A. (N. S.) 73; *In re Giffin's Estate*, 138 Pa. 327, 22 Atl. 91; *Foster v. McKenna* (Pa.) 11 Atl. 674; *Collins v. Williams*, 98 Tenn. 525, 41 S. W. 1056.

But if the limitation be to children, or, in default of children, to his legal heirs, the rule operates. *Brinton v. Martin*, 197 Pa. 615, 47 Atl. 841.

⁸⁰ *Faison v. Odom*, 144 N. C. 107, 56 S. E. 793; *Peirce v. Hubbard*, 152 Pa. 18, 25 Atl. 231.

tor.⁸¹ And where the intent of the testator is to create an independent estate in the remaindermen, not resting or based on any estate in their ancestor, the rule is not applicable.⁸² In many states, by statute, the rule has been wholly abolished in the case of both wills and deeds, while in others it has been abrogated in so far as it affects the construction of wills.

Estates Tail

The technical language to be used in creating an estate of this character by will is by a devise to one and the "heirs of his body,"⁸³ and it may be created by implication, when there is a devise over upon the first taker's dying without heirs of the body when no specific estate is, in terms, given to such taker.⁸⁴ But any language clearly indicating the testator's intent is enough, as in the case of a devise to one and "his heirs, entail,"⁸⁵ or by limitation over on failure of "lawful heirs," when it is manifest that the words were used as meaning "lineal heirs,"⁸⁶ or to his issue,⁸⁷ or by implication from a limitation over upon failure of issue understood as indicating indefinite failure,⁸⁸ and so with failure of offspring⁸⁹ or family.⁹⁰

⁸¹ *Millett v. Ford*, 109 Ind. 159, 8 N. E. 917. See *Earnhart v. Earnhart*, 127 Ind. 397, 26 N. E. 895, 22 Am. St. Rep. 652.

⁸² *Wyman v. Johnson*, 68 Ark. 369, 59 S. W. 250.

⁸³ *Rhodes v. Bouldry*, 138 Mich. 144, 101 N. W. 206; *Stansbury v. Hubner*, 73 Md. 228, 20 Atl. 904, 11 L. R. A. 204, 25 Am. St. Rep. 584; *Bone v. Tyrrell*, 113 Mo. 175, 20 S. W. 796; *Boyd v. Weber*, 193 Pa. 651, 44 Atl. 1078; *Ralston v. Truesdell*, 178 Pa. 429, 35 Atl. 813; *Shalters v. Ladd*, 141 Pa. 349, 21 Atl. 596; *Pearsol v. Maxwell*, 22 C. C. A. 262, 76 Fed. 428.

To create an estate tail, some words of procreation to indicate the body from which the heirs are to proceed must be used or necessarily implied from the language of the will. *Webbe v. Webbe*, 234 Ill. 442, 84 N. E. 1054, 17 L. R. A. (N. S.) 1079 (where court refused to treat the words "personal and lawful heirs" as equivalent to "heirs of the body begotten").

⁸⁴ *Chesebro v. Palmer*, 68 Conn. 207, 36 Atl. 42; *Bailey v. Hawkins*, 18 R. I. 573, 27 Atl. 512, 29 Atl. 65; *Holden v. Wells*, 18 R. I. 802, 31 Atl. 265; *Beilstein v. Beilstein*, 194 Pa. 152, 45 Atl. 73, 75 Am. St. Rep. 692; *Crumpe v. Crumpe*, 69 Law J. P. C. 7, [1900] App. Cas. 127, 82 Law T. (N. S.) 130.

⁸⁵ *DOTY v. TELLER*, 54 N. J. Law, 163, 23 Atl. 944, 33 Am. St. Rep. 670, *Dunmore Cas. Wills*, 252.

⁸⁶ *Titzell v. Cochran* (Pa.) 10 Atl. 9.

⁸⁷ *Pifer v. Locke*, 205 Pa. 616, 55 Atl. 790; *Cochran v. Cochran*, 127 Pa. 486, 17 Atl. 981.

⁸⁸ *St. John v. Dann*, 66 Conn. 402, 34 Atl. 110; *Horton v. Upham*, 72 Conn. 29, 43 Atl. 492; *Hertz v. Abrahams*, 110 Ga. 707, 36 S. E. 409, 50 L. R. A. 361; *Reinoehl v. Shirk*, 119 Pa. 108, 12 Atl. 806; *Palethorp v. Palethorp*, 194 Pa. 408, 45 Atl. 322; *Brown v. Addison Gilbert Hospital*, 155 Mass. 323, 29 N. E. 625; *Stouch v. Zeigler*, 196 Pa. 489, 46 Atl. 486; *Ray v. Alexander*, 146 Pa. 242, 23 Atl. 383.

⁸⁹ *Barber v. Railroad Co.*, 166 U. S. 83, 17 Sup. Ct. 488, 41 L. Ed. 925.

⁹⁰ *Beilstein v. Beilstein*, 194 Pa. 152, 45 Atl. 73, 75 Am. St. Rep. 692.

Where a devise is made to a person and his children, there being no children at the date of the will,⁹¹ or the word being clearly used in the sense of issue or descendants irrespective of their existence,⁹² a fee tail results, and it may also arise from implication from a limitation over upon the death of the first taker without children.⁹³

Much of the common-law learning respecting estates tail has become obsolete in consequence of the general adoption of statutes whose effect is to substantially abolish estates of this character either by converting them into fees simple, or enabling the first taker to bar the entail by a conveyance in fee, or converting the estate of such taker into a life estate with remainder in fee to the persons who would take at his death.

ESTATES FOR LIFE

124. Where the common-law rule still holds, a devise of realty passes only a life estate, in the absence of a clear intent to bestow a greater. Under the usual statutes, however, it is provided that every devise shall be construed to pass all the estate in the land which the testator could devise at the time of his death, unless an intention to pass a less estate appears from the will.

The common-law doctrine in this regard has already been discussed.⁹⁴ The most natural and apt words with which to create such an estate are by a direct gift to the beneficiary for his natural life.⁹⁵ Where these words are used, the estate for life is not en-

⁹¹ *Moore v. Gary*, 149 Ind. 51, 48 N. E. 630; *Nightingale v. Burrell*, 15 Pick. (Mass.) 104; *Silliman v. Whitaker*, 119 N. C. 89, 25 S. E. 742; *East v. Garrett*, 84 Va. 523, 9 S. E. 1112. This is commonly known as the "rule in Wild's Case," 6 Rep. 17. The rule is one of construction only and aims to give effect to the evident intention of testator to provide for unborn children who might otherwise be barred, if not in being at the time of distribution. Although generally followed, it has recently been held to be inapplicable in Pennsylvania. *Chambers v. Union Trust Co.*, 235 Pa. 610, 84 Atl. 512.

⁹² See *Hood v. Dawson*, 98 Ky. 285, 33 S. W. 75; *Sechler v. Eshleman*, 222 Pa. 35, 70 Atl. 910; *Knoderer v. Merriman* (Pa.) 7 Atl. 152; *Sheeley v. Neldhammer*, 182 Pa. 163, 37 Atl. 939.

⁹³ *Caulk's Lessee v. Caulk*, 3 Pennewill (Del.) 528, 52 Atl. 340; *Richardson v. Richardson*, 80 Me. 585, 16 Atl. 250.

⁹⁴ Ante, p. 407. See, also, *McAleer v. Schneider*, 2 App. D. C. 461; *Mulvane v. Rude*, 146 Ind. 476, 45 N. E. 659.

⁹⁵ See *Holt v. Pickett*, 111 Ala. 362, 20 South. 432 ("I lend to my daughter during her natural life," etc.); *Beers v. Narramore*, 61 Conn. 13, 22 Atl. 1061; *Cochran v. Hudson*, 110 Ga. 762, 36 S. E. 71; *Lomax v. Shinn*, 162 Ill. 124, 44 N. E. 495; *Morrison v. Schorr*, 197 Ill. 554, 64 N. E. 545; *Rusk v. Zuck*, 147 Ind. 388, 45 N. E. 691, 46 N. E. 674; *Cain v. Robertson*, 27 Ind. App. 198, 61 N. E. 26; *Smith v. Runnels*, 97 Iowa, 55, 65 N. W. 1002; *Call v. Shewmaker*

larged by a limitation over of what remains undisposed of after the death of the first taker,⁹⁶ nor by a power of disposal granted to the life tenant,⁹⁷ nor by a charge imposed upon the life estate, such as the payment of legacies or the support of another,⁹⁸ nor by limitation over to the life tenant upon the failure of an intermediate vested remainder;⁹⁹ but a devise of a life estate, coupled with a devise of the remainder to the same beneficiary, vests a fee simple in the devisee, there being no intermediate estate.¹ Words indicating an intention to create a life estate will not be construed to pass a fee

(Ky.) 69 S. W. 749; Webster v. Brown (Ky. 1903) 72 S. W. 774; Montgomery v. Montgomery (Ky.) 11 S. W. 596; Barnes v. Boardman, 149 Mass. 106, 21 N. E. 308, 3 L. R. A. 785; Sanborn v. Sanborn, 62 N. H. 631; May v. Lewis (1903) 132 N. O. 115, 43 S. E. 550; Winchester v. Hoover, 42 Or. 310, 70 Pac. 1035; In re Ritter's Estate, 148 Pa. 577, 24 Atl. 120; Vaughan v. Bridges, 61 S. C. 155, 39 S. E. 347; Overton v. Trust Co. (1903) 110 Tenn. 50, 72 S. W. 108; Morris v. Eddins, 18 Tex. Civ. App. 38, 44 S. W. 203; Robertson v. Hardy's Adm'r (Va.) 23 S. E. 766 (where the word "lend" was used); In re Amos [1891] 3 Ch. 159.

⁹⁶ Pendley v. Madison's Adm'r, 83 Ala. 484, 3 South. 618; Burns v. Burns (1903) 132 Mich. 441, 93 N. W. 1077; Walker v. Pritchard, 121 Ill. 221, 12 N. E. 336; Bradshaw v. Butler, 33 Ky. Law Rep. 531, 110 S. W. 420; Bramell v. Cole, 136 Mo. 201, 37 S. W. 924, 58 Am. St. Rep. 619; Paul v. Dole, 70 N. H. 593, 49 Atl. 572; Jessup v. Fenton, 47 App. Div. 622, 62 N. Y. Supp. 308; Crozier v. Bray, 120 N. Y. 366, 24 N. E. 712; Cox v. Sims, 125 Pa. 522, 17 Atl. 465; Gross v. Strominger, 178 Pa. 64, 35 Atl. 852; Behrens v. Baumann, 66 W. Va. 56, 66 S. E. 5, 27 L. R. A. (N. S.) 1092. Here the life tenant is only entitled to the net income of the estate. Stone v. Littlefield, 151 Mass. 485, 24 N. E. 592.

⁹⁷ Peckham v. Lego, 57 Conn. 553, 19 Atl. 392, 7 L. R. A. 419, 14 Am. St. Rep. 130; Neely v. Boyce, 128 Ind. 1, 27 N. E. 169; Jones v. Jones, 93 Ky. 532, 20 S. W. 604; WHITTEMORE v. RUSSELL, 80 Me. 297, 14 Atl. 197, 6 Am. St. Rep. 200, Dunmore Cas. Wills, 257; McCarty v. Fish, 87 Mich. 48, 49 N. W. 513; In re Hoyt's Estate, 71 Hun, 13, 24 N. Y. Supp. 577; In re Minton's Trust, 160 Pa. 506, 28 Atl. 847; In re Dull's Estate, 137 Pa. 112, 20 Atl. 418; Park's Adm'r v. Society, 62 Vt. 19, 20 Atl. 107; Thrall v. Spear, 63 Vt. 266, 22 Atl. 414; Lee v. Law (Va.) 19 S. E. 255; Johns v. Johns, 86 Va. 333, 10 S. E. 2. See post, p. 422.

So, where a life estate is given to the testator's adopted son, it is not enlarged to a fee by a subsequent provision that he should not be permitted to sell or incumber the property until he should be 25 years old; these words being intended to prevent the son from selling or mortgaging his interest. Metzen v. Schopp (1903) 202 Ill. 275, 67 N. E. 36.

⁹⁸ Zavitz v. Preston, 96 Iowa, 52, 64 N. W. 668; Anderson v. Ettridge, 125 Mich. 464, 84 N. W. 613; Brendel v. Hansen, 127 Mich. 396, 86 N. W. 951; Curtis v. Fowler, 66 Mich. 696, 33 N. W. 804; Gaukler v. Moran, 66 Mich. 353, 33 N. W. 513; Hinkle's Appeal, 116 Pa. 490, 9 Atl. 938; In re Gerhard's Estate, 160 Pa. 253, 28 Atl. 684; Loring v. Arnold, 15 R. I. 428, 8 Atl. 335; Mims v. Hair, 56 S. C. 4, 33 S. E. 729; Henry v. Pittsburgh Clay Mfg. Co., 80 Fed. 485, 25 C. C. A. 581.

⁹⁹ Everett v. Croskrey, 92 Iowa, 333, 60 N. W. 732.

¹ Spencer v. Kimball, 98 Me. 499, 57 Atl. 793.

merely because the will does not otherwise devise the remainder after life tenant's death.³

Where no definite estate is, in terms, given to the first taker, a limitation over upon his death is steadily construed as indicating an intent that such taker shall have a life estate,⁴ and such will be the result when an estate is given to the first taker and his heirs, when the plain intent is to confer a life estate, and not to attempt a limitation over a previously created fee.⁵ So a devise of an estate during widowhood,⁶ or "widowerhood,"⁶ creates a life estate defeasible

³ *Oriley v. Cassel* (1909) 144 Iowa, 685, 123 N. W. 348; *Shaner v. Wilson*, 207 Pa. 550, 56 Atl. 1086.

⁴ *Stone v. McEckron*, 57 Conn. 194, 17 Atl. 852; *Goodrich v. Pearce*, 83 Ga. 781, 10 S. E. 451; *Thomas v. Miller*, 161 Ill. 60, 43 N. E. 848; *Schaefer v. Schaefer*, 141 Ill. 337, 31 N. E. 136; *Boekemler v. Boekemler*, 157 Iowa, 372, 138 N. W. 493; *Rice v. Moyer*, 97 Iowa, 96, 66 N. W. 94; *McGraw v. Miner* (Ky.) 15 S. W. 6; *Hopper v. Harrod* (Ky.) 24 S. W. 870; *Defreese v. Lake*, 109 Mich. 415, 67 N. W. 505, 32 L. R. A. 744, 63 Am. St. Rep. 584; *Cousino v. Cousino*, 86 Mich. 323, 48 N. W. 1084; *Eldred v. Shaw*, 112 Mich. 237, 70 N. W. 545; *Greene v. Mallary's Estate*, 127 Mich. 119, 86 N. W. 541, 89 N. W. 348; *Cross v. Hoch*, 149 Mo. 325, 50 S. W. 786; *Schorr v. Carter*, 120 Mo. 409, 25 S. W. 538; *Harbison v. James*, 90 Mo. 411, 2 S. W. 292; *Peirsol v. Roop*, 56 N. J. Eq. 739, 40 Atl. 124; *Cromwell v. Cromwell*, 55 App. Div. 103, 66 N. Y. Supp. 1063; *Ketcham v. Ketcham*, 66 Hun, 608, 22 N. Y. Supp. 8; *Smathers v. Moody*, 112 N. C. 791, 17 S. E. 532; *Howell v. Knight*, 100 N. C. 254, 6 S. E. 721; *Taylor v. Bell*, 158 Pa. 651, 28 Atl. 208, 38 Am. St. Rep. 857; *Shields v. McAuley* (1903) 205 Pa. 45, 54 Atl. 491; *Cook v. Dyer*, 17 R. I. 90, 20 Atl. 243; *Robert v. Ellis*, 59 S. C. 137, 37 S. E. 250; *Nicholson v. Drennan*, 35 S. C. 333, 14 S. E. 719; *Johnston v. Osmont* (Tenn. Ch. App.) 59 S. W. 644; *Le Sage v. Le Sage* (1903) 52 W. Va. 323, 43 S. E. 137; *Robinson v. Robinson*, 89 Va. 916, 14 S. E. 916; *In re Littlewood's Will*, 96 Wis. 608, 71 N. W. 1047; *In re Keniston's Will*, 73 Vt. 75, 50 Atl. 558.

⁵ See *Shalters v. Ladd*, 163 Pa. 509, 30 Atl. 283 (where a devise was to the testator's daughter and to her heirs, for her sole use, she to receive the profits thereof, and after her death the same to vest in her lawful issue); *Appeal of Geiger* (Pa.) 16 Atl. 851 (where by the first clause of the will the testator gave all his property, real and personal, to his wife and her heirs. The executors were authorized to sell any of the property to pay debts, following which was a provision that "after the death of my wife the property, both real and personal, shall be sold, and all my just debts paid, and the remainder of the money to be equally shared among my children." Held, that the wife took a life estate only).

⁶ *Fields v. Bush*, 94 Ga. 664, 21 S. E. 827; *Kratz v. Kratz*, 189 Ill. 276, 59 N. E. 519; *Rose v. Hale*, 185 Ill. 378, 56 N. E. 1073, 76 Am. St. Rep. 40; *Commons v. Commons*, 115 Ind. 162, 16 N. E. 820, 17 N. E. 271; *Russell v. Werntz*, 88 Md. 210, 44 Atl. 219; *Fuller v. Wilbur*, 170 Mass. 506, 49 N. E. 916; *Peck v. Griffiths*, 148 Mich. 682, 112 N. W. 722; *Dubois v. Van Valen*, 61 N. J. Eq. 331, 48 Atl. 241; *Rausch v. Rausch* (Sup.) 31 N. Y. Supp. 786; *In re McClure*, 136 N. Y. 238, 32 N. E. 758; *In re Brooks' Will*, 125 N. C. 136, 34 S. E. 265; *Patton v. Church*, 168 Pa. 321, 31 Atl. 1079; *Vaughan v. Vaughan's Ex'x*, 97 Va. 322, 33 S. E. 603.

⁶ *Greenhalgh v. Marggraff*, 55 Hun, 605, 7 N. Y. Supp. 728.

by a second marriage; and the same rule applies to a devise to one so long as she shall remain single,⁷ when such devise is not regarded as imposing an undue restraint upon marriage.⁸ But a devise of land to children, "allowing my wife the use and maintenance of said property * * * so long as she remains a widow," imposes a charge upon the land for the benefit of the widow rather than a life estate therein.⁹ A devise for the use, support, or benefit of the beneficiary creates a life estate in him,¹⁰ as does also a gift giving the taker the right to sell and use as much of the estate as is necessary for her comfort, with remainder over,¹¹ or a gift of a house to a wife "as a homestead for her and my children by her,"¹² or a devise of the possession, use, and management of lands during the devisee's natural life.¹³ And a devise to a son, not subject to sale or liability for debts, to descend to his bodily heirs, with limitation over, creates in the son a life estate only,¹⁴ as does a devise for the "term of five years or longer."¹⁵ A gift of a "dowry" in real estate,¹⁶ or a devise making a "loan in lieu of dower,"¹⁷ confers a life estate. And frequently a gift to a husband or wife, with a clear intent that the children shall also have an interest therein, is construed as creating a life estate in the spouse, with remainder in the children, when the will calls for construction at all.¹⁸

⁷ *Ruggles v. Jewett*, 213 Mass. 167, 99 N. E. 1092; *Maddox v. Yoe*, 121 Md. 288, 88 Atl. 225, Ann. Cas. 1915B, 1235; *Ferris v. Ferris*, 10 Misc. Rep. 317, 30 N. Y. Supp. 951; *Graham v. Heldrick* (1903) 204 Pa. 238, 53 Atl. 1002; *Furbee v. Furbee*, 49 W. Va. 191, 38 S. E. 511.

⁸ See post, p. 464.

⁹ *Jackson v. Jackson*, 56 S. C. 346, 33 S. E. 749.

¹⁰ *Byrne v. McGrath*, 130 Cal. 316, 62 Pac. 559, 80 Am. St. Rep. 127; *Koenig v. Kraft*, 87 Ky. 95, 7 S. W. 622, 12 Am. St. Rep. 463; *Mayes v. Karn* (1903) 115 Ky. 264, 72 S. W. 1111; *Chase v. Ladd*, 155 Mass. 417, 29 N. E. 637; *Langley v. Tilton*, 67 N. H. 88, 36 Atl. 610; *Oyster v. Knull*, 137 Pa. 448, 20 Atl. 624, 21 Am. St. Rep. 890; *In re Nevins' Estate*, 192 Pa. 258, 43 Atl. 996. *Semble*: *Allen v. Boomer*, 82 Wis. 364, 52 N. W. 426.

¹¹ *Hatch v. Caine*, 86 Me. 282, 29 Atl. 1076.

¹² *Brand v. Rhodes' Adm'r* (Ky.) 30 S. W. 597. *Semble*: *Arrants v. Crumley* (Tenn. Ch. App.) 48 S. W. 342.

¹³ *Austin v. Hyndman*, 119 Mich. 615, 78 N. W. 663. And so with a will devising "to my husband the use and occupancy of the lower half of the store as now occupied by him." *Wilson v. Curtis*, 90 Me. 463, 38 Atl. 365.

¹⁴ *Turner v. Hause*, 199 Ill. 464, 65 N. E. 445 (where estate tail not recognized).

¹⁵ *Dow v. Abbott*, 197 Mass. 283, 84 N. E. 96.

¹⁶ *Wendler v. Lambeth*, 163 Mo. 428, 63 S. W. 684.

A life estate is created by a devise of a "life right," a "dower of use," or of "benefits and profits." *Goldsboro Lumber Co. v. Hines Bros. Lumber Co.*, 153 N. C. 49, 68 S. E. 929.

¹⁷ *Britt v. Rawlings*, 87 Ga. 146, 13 S. E. 336.

¹⁸ See *Anderson v. Anderson*, 191 Ill. 100, 60 N. E. 810 (where property was

Life Estate Coupled with General Power of Disposition

A general power of disposition includes a power to dispose of the property by deed or will, and practically clothes the donee with all functions of ownership. In view of this fact, it has occasionally been provided by statute, and a few courts have reached the conclusion, without the help of the legislature, that the devisee of a life estate, with a general power of disposition, takes a fee simple,¹⁹ and that a limitation over is void.²⁰ But, on principle and by the overwhelming weight of authority, no fee results from the union of the life estate and the power, but both remain distinct, and the limitation over is good unless defeated by the exercise of the power by the life tenant.²¹ But, in applying the rule against perpetuities,

given to the husband, "to hold unto my or our son's, his heirs and assigns"); *Shannon v. Bonham*, 27 Ind. App. 369, 60 N. E. 951; *Frank v. Unz*, 91 Ky. 621, 18 S. W. 712 (where the devise was to a wife "for her own use and the benefit of our children forever"); *Adams v. Adams* (Ky.) 47 S. W. 335 (to a daughter "and her children in their exclusive right"); *Swarthout v. Swarthout*, 111 Wis. 102, 86 N. W. 558; *Chadwick v. Wilson*, 73 Hun, 485, 26 N. Y. Supp. 394.

¹⁹ *Hood v. Bramlett*, 105 Ala. 660, 17 South. 105 (under Code Ala. 1886, § 1852, providing that in all cases where an absolute power of disposition is given to the owner of a particular estate, unaccompanied by any trust, and no estate is limited on the estate of the donee of the power, he is entitled to an absolute fee); *Byrne v. Weller*, 61 Ark. 366, 33 S. W. 421; *Deegan v. Wade*, 144 N. Y. 573, 39 N. E. 692 (under 3 Birdseye, Rev. St. p. 3036, § 129); *Smith v. Floyd*, 71 Hun, 56, 24 N. Y. Supp. 610; *In re Moehring*, 154 N. Y. 423, 48 N. E. 818; *Hershey v. Bank*, 71 Minn. 255, 73 N. W. 967 (under Gen. St. Minn. 1894, § 4309); *McKnight v. McKnight* (1908) 120 Tenn. 431, 115 S. W. 134; *Randall v. Harrison*, 109 Va. 686, 64 S. E. 992; *Bing v. Burrus*, 106 Va. 478, 56 S. E. 222.

The decisions which, in the absence of statute, hold that a fee passes when a general power of disposition is coupled with a life estate, seem to be clearly erroneous. They result from a failure to distinguish between a power to dispose of another's property, which excludes the idea of ownership, and the power of disposal which is necessarily incident to all ownership in fee. See *Burleigh v. Clough*, 52 N. H. 267, 271, 13 Am. Rep. 23.

²⁰ *Hair v. Caldwell*, 109 Tenn. 148, 70 S. W. 610. Compare *Young v. Insurance Co.*, 101 Tenn. 311, 47 S. W. 428.

²¹ *Morffew v. Railroad Co.*, 107 Cal. 587, 40 Pac. 810; *Adams v. Lillibridge*, 73 Conn. 655, 49 Atl. 21; *Mansfield v. Shelton*, 67 Conn. 390, 35 Atl. 271, 52 Am. St. Rep. 285; *Kirkpatrick v. Kirkpatrick*, 197 Ill. 144, 64 N. E. 267; *Walker v. Pritchard*, 121 Ill. 221, 12 N. E. 336; *SKINNER v. McDOWELL*, 169 Ill. 365, 48 N. E. 310, 61 Am. St. Rep. 183, *Dunmore Cas. Wills*, 255; *Walford v. Hemmer* (Ill.) 28 N. E. 806; *Wiley v. Gregory*, 135 Ind. 647, 35 N. E. 507; *Eubank v. Smiley*, 130 Ind. 393, 29 N. E. 919; *Rusk v. Zuck*, 147 Ind. 388, 45 N. E. 691, 46 N. E. 674; *Podaril v. Clark*, 118 Iowa, 264, 91 N. W. 1091; *Ernst v. Foster*, 58 Kan. 438, 49 Pac. 527; *Graham v. Botner* (Ky.) 37 S. W. 583; *Payne v. Johnson's Ex'rs*, 95 Ky. 175, 24 S. W. 238, 609; *McCullough's Adm'r v. Anderson*, 90 Ky. 126, 13 S. W. 353, 7 L. R. A. 836; *Loeb v. Struck* (Ky.) 42 S. W. 401; *Brady v. Brady*, 78 Md. 461, 28 Atl. 515; *Collins*

such a devisee is regarded as having the absolute estate.²² The power, properly exercised, conveys to the taker a clear title as against the remainderman.²³

The devise of property for life, to be disposed of as the devisee shall deem proper at his decease, bestows an absolute power of appointment by deed or will.²⁴

A power, conferred in terms, may be defeated by other language in the will disclosing the testator's intention, as where a devise was made for life, to be "hers in the full sense of ownership, even so far that she is empowered to sell, mortgage, or divide the same, * * * but this shall not be so understood as that my said wife has the right to divide the property herein named among persons not kindred to me, to the disadvantage of our children, but they shall, after her death, divide the estate among them equally," it being held that the wife took a life estate only.²⁵ A power to sell does not include a power to devise.²⁶ A devise of a life estate, the property to be disposed of "at the discretion" of the life tenant, and "at her decease to go to my nearest of kin," limits the power of disposition to transfers during life and not by will.²⁷ But a power in such life tenant to dispose of the land at her pleasure at her death

v. Wickwire, 162 Mass. 143, 38 N. E. 365; *Sawin v. Cormier*, 179 Mass. 420, 60 N. E. 936; *Semper v. Coates*, 93 Minn. 76, 100 N. W. 662; *Evans v. Folks*, 135 Mo. 397, 37 S. W. 126; *McMillan v. Farrow*, 141 Mo. 55, 41 S. W. 890; *Redman v. Barger*, 118 Mo. 568, 24 S. W. 177; *Lewis v. Pitman*, 101 Mo. 281, 14 S. W. 52; *Shapleigh v. Shapleigh*, 69 N. H. 577, 44 Atl. 107; *Robeson v. Shotwell*, 55 N. J. Eq. 318, 36 Atl. 780; *Chewning v. Mason*, 158 N. C. 578, 74 S. E. 357, 39 L. R. A. (N. S.) 805; *Kennedy v. Kennedy*, 159 Pa. 327, 28 Atl. 241 (distinguishing *Forsythe v. Forsythe*, 108 Pa. 129); *In re Tilton*, 21 R. I. 426, 44 Atl. 223; *Sires v. Sires*, 43 S. C. 266, 21 S. E. 115; *Davis v. Kirksey*, 14 Tex. Civ. App. 380, 37 S. W. 994; *Perkinson v. Clarke*, 135 Wis. 584, 116 N. W. 229; *In re Sanford*, 70 Law J. Ch. 591, [1901] 1 Ch. 939, 84 Law T. 456.

²² *Miffin v. Miffin*, 121 Pa. 205, 15 Atl. 525. See, also, Gray, *Rule Against Perp.* (3d Ed.) § 524.

²³ *Ashton v. Railroad Co.*, 78 Minn. 201, 80 N. W. 963; *Coats' Ex'r v. Railroad Co.*, 92 Ky. 263, 17 S. W. 564. *Semble*: *Livingston v. Koenig*, 20 Tex. Civ. App. 398, 50 S. W. 463.

²⁴ *Todd v. Sawyer*, 147 Mass. 570, 17 N. E. 527; *Moseley v. Stewart* (Tenn. Ch. App.) 52 S. W. 671; *Benesch v. Clark*, 49 Md. 497.

²⁵ *Bowser v. Mattler*, 137 Ind. 649, 35 N. E. 701, 36 N. E. 714. *Semble*: *In re Stumpenhousen's Estate*, 108 Iowa, 555, 79 N. W. 376; *Kunz v. Puster*, 130 Ind. 277, 29 N. E. 1055.

²⁶ *Kirkpatrick v. Kirkpatrick*, 197 Ill. 144, 64 N. E. 267; *Mooy v. Gallagher*, 36 R. I. 405, 90 Atl. 663.

²⁷ *Keniston v. Mayhew*, 169 Mass. 166, 47 N. E. 612; *Mann v. Martin*, 172 Ill. 18, 49 N. E. 706. *Semble*: *Minges v. Mathewson*, 66 App. Div. 379, 72 N. Y. Supp. 612.

gives power to devise the fee.²⁸ The power to devise may be general, or it may be limited to devises to certain classes or individuals.²⁹

Life Estate Coupled with Limited Power of Disposition

Except in certain jurisdictions where a life estate coupled with particular powers of disposal comes within the purview of statutes passed to enable creditors of the life tenant to reach, as fees simple, estates for life with power of disposal where there is no limitation over, it is agreed that such an estate, coupled with a limited power of disposition, is not thereby enlarged to a fee,³⁰ and that a limitation over, in event of the non-exercise of the power, is valid.³¹

The most common instance of this character is where an estate for life is given to a husband or wife, with power to sell the property, if need be, for the comfortable support and maintenance of the beneficiary.³² When, under these circumstances, the beneficiary is intrusted with power to dispose of the property as he may deem necessary, he is the absolute judge of the necessity,³³ but he must act in good faith; and any unreasonable appropriation to his own

²⁸ *Dillon v. Faloan*, 158 Pa. 468, 27 Atl. 1082.

²⁹ *Smith v. Hardesty*, 88 Md. 387, 41 Atl. 788.

³⁰ *Glover v. Stillson*, 56 Conn. 316, 15 Atl. 752; *Bergman v. Arnhold*, 242 Ill. 218, 89 N. E. 1000; *Rinkenberger v. Meyer*, 155 Ind. 152, 56 N. E. 913; *Baldwin v. Morford*, 117 Iowa, 72, 90 N. W. 487; *Hambel v. Hambel* (Iowa) 75 N. W. 673; *McConnell v. Wilcox* (Ky.) 12 S. W. 469; *Holsen v. Rockhouse*, 83 Ky. 233; *Degman v. Degman*, 98 Ky. 717, 34 S. W. 523; *Baker v. Thompson*, 162 Mass. 40, 37 N. E. 751; *Long v. Waldraven*, 113 N. C. 337, 18 S. E. 251; *In re Schmid's Estate*, 182 Pa. 267, 37 Atl. 928; *Bucklin v. Creighton*, 18 R. I. 325, 27 Atl. 221; *Watson v. Watson* (Tenn. Ch. App.) 57 S. W. 385; *Waller v. Martin*, 106 Tenn. 341, 61 S. W. 73, 82 Am. St. Rep. 882; *Hood v. Haden*, 82 Va. 588; *Smythe v. Smythe*, 90 Va. 638, 19 S. E. 175; *Newman v. Newman* (1906) 60 W. Va. 371, 55 S. E. 377, 7 L. R. A. (N. S.) 370.

³¹ *Whittaker v. Gutheridge*, 52 Ill. App. 460; *In re Proctor's Estate*, 95 Iowa, 172, 63 N. W. 670; *Lee v. Vault Co.* (Ky.) 57 S. W. 239; *Bradway v. Holmes*, 50 N. J. Eq. 311, 25 Atl. 193; *Dye v. Beaver Creek Church*, 48 S. C. 444, 26 S. E. 717, 59 Am. St. Rep. 724; *Miller's Adm'r v. Potterfield*, 86 Va. 876, 11 S. E. 486, 19 Am. St. Rep. 919.

³² See *Rowe v. Rowe* (1903) 120 Iowa, 17, 94 N. W. 258; *Baldwin v. Morford*, 117 Iowa, 72, 90 N. W. 487; *Rowley v. Sanns*, 141 Ind. 179, 40 N. E. 674; *Morse v. Inhabitants of Natick*, 176 Mass. 510, 57 N. E. 996; *Jones v. Deming*, 91 Mich. 481, 51 N. W. 1119; *Glover v. Reid*, 80 Mich. 228, 45 N. W. 91; *Wood v. Robertson*, 113 Ind. 323, 15 N. E. 457; *Jenkins v. Compton*, 123 Ind. 117, 23 N. E. 1091; *Barker v. Clark*, 72 N. H. 334, 56 Atl. 747; *Stevens v. Flower*, 46 N. J. Eq. 340, 19 Atl. 777.

A power to consume the principal of both real and personal estate authorizes donee to convey the real estate. *Kennedy v. Pittsburg & L. E. R. Co.*, 216 Pa. 575, 65 Atl. 1102.

³³ *Hosman v. Willett*, 32 Ky. Law Rep. 906, 107 S. W. 334; *Small v. Thompson*, 92 Me. 539, 43 Atl. 509.

use may be restrained in equity at the instance of any of the remaindermen.³⁴ The life tenant cannot make gratuitous conveyances³⁵ nor remit the interest on a mortgage belonging to the estate,³⁶ nor can he make a gift of notes received on the sale of property under the power.³⁷ When the necessity for a sale exists, the grantee, under the power, takes the absolute fee,³⁸ or such title as testator had,³⁹ and the entire property may be conveyed in consideration of a life support secured to the beneficiary by her grantee, if she acts in good faith.⁴⁰

Where a life estate is devised, a power in the beneficiary to dispose of the property, when necessary for her support, is implied from a limitation over of what may be left at the first taker's death.⁴¹ Thus, where land is devised to a wife "to have for her comfort and support if she needs the same," with provision for a legacy "if there is enough of my property left" at the death of the wife, a mortgage by the wife to secure means for her support is valid.⁴²

Where an estate is devised for life, a further provision that the devisee cannot alienate or incumber his interest, and that it shall not be subject to attachment or levy, is void as repugnant to the estate created.⁴³ But a provision that a devisee of a life estate shall not alienate the land devised until he reaches a certain age will not be construed to enlarge such estate to a fee.⁴⁴

³⁴ *Little v. Geer*, 69 Conn. 411, 37 Atl. 1056. See, also, *Embry v. Embry*, 81 Ky. Law Rep. 295, 102 S. W. 239.

³⁵ *Bevans v. Murray*, 251 Ill. 603, 96 N. E. 546; *Farlin v. Sanborn* (1910) 161 Mich. 615, 126 N. W. 634, 137 Am. St. Rep. 525.

This rule applies although the donee is given power to dispose of the property as she may think proper and although the devise is not in terms given for her support. *Johnson v. Johnson*, 51 Ohio St. 446, 38 N. E. 61.

³⁶ *Greene v. Mallary's Estate*, 137 Mich. 119, 86 N. W. 541, 89 N. W. 348 (where donee given right to use only what is necessary from aggregate estate).

A life tenant usually has the right to all the income during his life, and may dispose of such income by gift or otherwise. *Gibbes v. Watson* (1907) 92 Miss. 9, 45 South. 5.

³⁷ *Bowser v. Mattler*, 137 Ind. 649, 35 N. E. 701, 36 N. E. 714.

³⁸ *Warren v. Ingram* (1910) 96 Miss. 438, 51 South. 888, Ann. Cas. 1912B, 422; *Larsen v. Johnson*, 78 Wis. 300, 47 N. W. 615, 23 Am. St. Rep. 404.

³⁹ *Goss v. Withers*, 153 Ky. 5, 154 S. W. 398.

⁴⁰ *Richardson v. Richardson*, 80 Me. 585, 16 Atl. 250.

⁴¹ *In re Foster's Will*, 76 Iowa, 364, 33 N. W. 135, 41 N. W. 43; *Greenwalt v. Keller*, 75 Kan. 578, 90 Pac. 233; *Champney v. Bradford* (1907) 196 Mass. 259, 81 N. E. 993; *Kendall v. Case*, 84 Hun, 124, 32 N. Y. Supp. 553; *Leggett v. Firth*, 132 N. Y. 7, 29 N. E. 950; *Kenny v. Keplinger*, 89 Ill. App. 570.

⁴² *Swarthout v. Ranler*, 143 N. Y. 499, 38 N. E. 726.

⁴³ *McCormick Harvesting Mach. Co. v. Gates*, 75 Iowa, 343, 39 N. W. 657; *Hunt v. Hawes*, 181 Ill. 343, 54 N. E. 953.

⁴⁴ *Metzen v. Schoff*, 202 Ill. 275, 67 N. E. 36.

Where a will gave the testator's property to his wife during her natural life or until she might marry, with a general power of disposition and limitation over, she was held to take a life estate only, without power of disposal.⁴⁵ A holding that her subsequent marriage would defeat a prior conveyance would apparently have been more in accord with the testator's intention.⁴⁶

JOINT TENANCY AND TENANCY IN COMMON

125. At common law a devise to two or more persons, unaccompanied by explanatory words, made them joint tenants.

126. By statute joint tenancies have generally been either abolished, or two or more persons taking an estate, whether by deed or will, are made tenants in common, unless they are expressly declared to take as joint tenants, or an intention to that end is clearly made to appear.

At common law a devise "unto my two sons," naming them, makes them joint tenants of the land devised.⁴⁷ Under statutes enacted in many jurisdictions they would take in common.⁴⁸ At common law a devise to one and his children, there being children living at the time of the devise, carried a joint tenancy.⁴⁹ By statute, or by a refusal to follow the earlier common-law holdings, they would now take as tenants in common.⁵⁰ So, where husband and wife would formerly have taken by the entirety, they now commonly, by statute, are tenants in common.⁵¹ But in most jurisdic-

⁴⁵ *Patty v. Goolsby*, 51 Ark. 61, 9 S. W. 846; *Douglass v. Sharp*, 52 Ark. 113, 12 S. W. 202; *Giles v. Little*, 104 U. S. 291, 26 L. Ed. 745.

⁴⁶ See *Hensler v. Senfert*, 52 N. J. Eq. 754, 29 Atl. 202; *Yetzer v. Brisse*, 190 Pa. 346, 42 Atl. 677.

⁴⁷ *Gaunt v. Stevens*, 241 Ill. 542, 89 N. E. 812; *Lockhart v. Vandyke*, 97 Va. 356, 33 S. E. 613.

⁴⁸ *In re Kimberly's Estate*, 150 N. Y. 90, 44 N. E. 945; *Cohen v. Herbert*, 205 Mo. 537, 104 S. W. 84, 120 Am. St. Rep. 772.

In some jurisdictions the common-law doctrine of survivorship as between joint tenants has been repudiated without the aid of a statute. *Allen v. Almy* (1913) 87 Conn. 517, 89 Atl. 205; *Sergeant v. Steinberger*, 2 Ohio, 305, 15 Am. Dec. 553.

⁴⁹ *Moore v. Gary*, 149 Ind. 51, 48 N. E. 630; *Noble v. Teeple*, 58 Kan. 398, 49 Pac. 598.

⁵⁰ *Whitfield v. Means*, 140 Ga. 430, 78 S. E. 1067; *New England Mortg. Security Co. v. Gordon*, 95 Ga. 781, 22 S. E. 706; *Kyte v. Kyte*, 73 N. J. Eq. 220, 67 Atl. 933; *Hampton v. Wheeler*, 99 N. C. 222, 6 S. E. 236; *Lewis v. Stancil*, 154 N. C. 326, 70 S. E. 621.

⁵¹ *Bader v. Dyer*, 106 Iowa, 715, 77 N. W. 469, 68 Am. St. Rep. 332; *Robin-*

tions a joint tenancy may still be created, as when property is given to devisees and the survivor of them.⁵² Where words of severance are necessary to enable the court to find a tenancy in common,⁵³ the words "all and every" the children of a certain individual are not sufficient.⁵⁴

When the property is to be divided among the beneficiaries "share and share" alike⁵⁵ or "equally,"⁵⁶ they take as tenants in common. So a tenancy in common, under the statute, is created by a devise to a husband and three designated daughters so long as any two of the daughters should remain unmarried,⁵⁷ or to a son and daughter of property "to be joint property," transferable by the joint deed of "the son and daughter, or either of them may sell their interest in the property" after a certain time,⁵⁸ or to a son and his wife of a farm "for their use * * * during their natural lives."⁵⁹

Where the statute provides that two or more persons taking an estate shall take as tenants in common, unless they are expressly declared to take as joint tenants, the fact that an estate is devised to two or more devisees "jointly" is not sufficient to show that testator intended the entire estate to pass to the survivor.⁶⁰

A devise to two specified devisees of "one parcel of land * * * to be divided as follows," specifying the manner of division, and reciting that one of the devisees should have a described portion, gives each an estate in severalty.⁶¹ But a partial bounding of the portion which one of the devisees is to take does not render them other than tenants in common.⁶²

son's Appeal, 88 Me. 17, 33 Atl. 652, 30 L. R. A. 331, 51 Am. St. Rep. 367; American Nat. Bank v. Taylor, 112 Va. 1, 70 S. E. 534, Ann. Cas. 1912D, 40.

⁵² Neal v. Hamilton Co., 70 W. Va. 250, 73 S. E. 971. But not a bequest to two persons "and the longest liver of them." Pierce v. Baker, 58 N. H. 531.

⁵³ In re Yates, [1891] 3 Ch. 53.

⁵⁴ Binning v. Binning, 13 Rep. 654.

⁵⁵ See Gaunt v. Stevens, 241 Ill. 542, 89 N. E. 812; Bishop v. McClelland's Ex'rs, 44 N. J. Eq. 450, 16 Atl. 1, 1 L. R. A. 551; Shattuck v. Wall, 174 Mass. 167, 54 N. E. 488; Hornberger v. Miller, 28 App. Div. 199, 50 N. Y. Supp. 1079; Clark v. Clark, 17 Can. S. C. R. 376; Dodds v. Winslow, 26 Ind. App. 652, 60 N. E. 458 (to husband and wife, share and share alike).

⁵⁶ Blaine v. Dow, 111 Me. 480, 89 Atl. 1126; Hazard v. Stevens, 36 R. I. 90, 88 Atl. 980.

⁵⁷ Dana v. Murray, 122 N. Y. 604, 26 N. E. 21.

⁵⁸ Rodney v. Landau, 104 Mo. 251, 15 S. W. 962.

⁵⁹ Miner v. Brown, 133 N. Y. 308, 31 N. E. 24.

⁶⁰ Mustain v. Gardner, 203 Ill. 284, 67 N. E. 779; Overheiser v. Lackey, 207 N. Y. 229, 100 N. E. 738, Ann. Cas. 1914C, 229.

⁶¹ Mitchell v. Hoggard, 108 N. C. 353, 12 S. E. 844. Semble: Houck v. Patterson, 126 N. C. 885, 36 S. E. 198.

⁶² Midgett v. Midgett, 117 N. C. 8, 23 S. E. 37; McCamant v. Nuckolls, 85 Va. 331, 12 S. E. 160.

INTERESTS IN PERSONAL PROPERTY

127. A bequest of personal property, in the absence of an express intent to the contrary, gives the absolute title thereto to the beneficiary.

The rule which, by statute, has generally been made to apply to devises, has always been recognized in bequests of personal property. Words of inheritance are not necessary to give absolute title to bequests.⁶³ Where there is an unqualified bequest of personal property the same rule applies as in the case of absolute devises,⁶⁴ and all limitations over whose purpose is not to reduce the interest thus given are void as being repugnant to the estate already created.⁶⁵ For the same reason, when the first taker under an unlimited bequest of personalty is given an absolute power of disposition, any further limitation is void.⁶⁶

Estates tail have never existed in personal property,⁶⁷ and words which would create an estate tail in real estate pass an absolute

⁶³ *Mulvane v. Rude*, 146 Ind. 476, 45 N. E. 659; *Crosgrove v. Crosgrove*, 69 Conn. 416, 38 Atl. 219 (a bequest of money to be put at usury, or to the best interests of the church, held an absolute gift to the church); *Loring v. Hayes*, 86 Me. 351, 29 Atl. 1093 (a bequest of a certain amount "to my wife, to be paid to her in cash or in such personal securities as she may select from my estate"); *Ellis v. Aldrich*, 70 N. H. 219, 47 Atl. 95; *Kimble v. White*, 50 N. J. Eq. 28, 24 Atl. 400; *Nye v. Koehne*, 22 R. I. 118, 47 Atl. 215 (where money was left in trust "for the sole use of the beneficiary," with no remainder over); *Martin v. Fort*, 27 C. C. A. 428, 83 Fed. 19 (accord); *Gallison v. Quinn* (1903) 183 Mass. 241, 66 N. E. 961 (where the bequest was to a legatee, for her sole use and benefit); *Twiss v. Simpson* (1903) 183 Mass. 212, 66 N. E. 795.

So the bequest of the interest or produce of a fund, directly or through a trustee, without limitation as to continuance, is a gift of the fund itself. *Hartson v. Elden*, 50 N. J. Eq. 522, 26 Atl. 561; *Angell v. Springfield Home for Aged Women*, 157 Mass. 241, 31 N. E. 1064.

⁶⁴ See ante, p. 412.

⁶⁵ *Wilson v. Turner*, 164 Ill. 398, 45 N. E. 820; *Stimson v. Rountree*, 168 Ind. 169, 78 N. E. 331, 80 N. E. 149; *Talbot v. Snodgrass*, 124 Iowa, 681, 100 N. W. 500; *Snedeker v. Congdon*, 41 App. Div. 433, 58 N. Y. Supp. 885; *Cooke v. Bucklin*, 18 R. I. 606, 29 Atl. 840; *In re Engel's Estate*, 180 Pa. 215, 36 Atl. 727; *Cox v. Anderson's Adm'r* (Ky.) 69 S. W. 953; *Rebman v. Dierdorff*, 186 Pa. 401, 40 Atl. 517; *In re Kimball's Will*, 20 R. I. 619, 40 Atl. 847; *In re Elliott*, [1896] 2 Ch. 353.

⁶⁶ *Lord v. Pearson*, 108 Me. 565, 83 Atl. 1102; *Young v. Robinson*, 122 Mo. App. 187, 99 S. W. 20; *Meacham v. Graham*, 98 Tenn. 190, 39 S. W. 12; *Robertson v. Hardy's Adm'r* (Va.) 23 S. E. 766.

This rule has, however, been held to be only one of construction and not one of law. *In re Tyson's Case*, 191 Pa. 218, 43 Atl. 131; *In re Watson's Estate*, 241 Pa. 271, 88 Atl. 433.

⁶⁷ 2 Blackstone's Comm. 113.

estate in personal property,⁶⁸ even where the real and personal property are included in the same disposition.⁶⁹

Where the rule in Shelley's Case is recognized, it is, by analogy, applied to gifts of personalty, if no contrary intent appears.⁷⁰ Thus, where a will bequeathed the use and interest of a mortgage on certain lands to the testator's two daughters for their lives, and on their deaths to their heirs, the two daughters were held to be the absolute owners of the mortgage.⁷¹

A bequest of shares of corporate stock and the income thereof to several legatees, each of whom is to take both income and principal in equal proportions, creates a tenancy in common.⁷²

Life Estate

A life estate in personal property may be created, if the testator clearly manifests his intention to that end, as where the property or the interest or income thereof is given, in terms, to a beneficiary, for life,⁷³ or where the fund is given in trust the income only to be paid over to the beneficiary, without limiting the period, in terms, to his life,⁷⁴ particularly when there is a remainder over.⁷⁵ The interest of a legatee for life is not enlarged to an absolute estate by the fact that he is, by the will, intrusted with the fund,⁷⁶

⁶⁸ *Powell v. Glenn*, 21 Ala. 458; *Hughes v. Nicklas*, 70 Md. 484, 17 Atl. 398, 14 Am. St. Rep. 377; *In re Tillinghast* (1903) 25 R. I. 338, 55 Atl. 879.

⁶⁹ *Jones v. Jones*, 13 N. J. Eq. 236, 239.

⁷⁰ *Evans v. Weatherhead*, 24 R. I. 502, 53 Atl. 866; *Glover v. Condell*, 163 Ill. 566, 45 N. E. 173, 35 L. R. A. 360.

⁷¹ *Knox v. Barker*, 8 N. D. 272, 78 N. W. 352 (applying the law of Pennsylvania to a will made in that state); *Hughes v. Nicklas*, 70 Md. 484, 17 Atl. 398, 14 Am. St. Rep. 377 (where a leasehold was devised for life, with remainder to the heirs of the life tenant); *Seeger v. Leakin*, 76 Md. 500, 23 Atl. 862 (accord).

But where a will gave to C. the use of \$1,000 and certain real property, and provided that C. "may invest or use all this property as he may, in his discretion, think best, during his natural life, and at his death to go to the heirs of his body, and to be used for their education, if necessary," the rule was held not to apply, and C. took only a life estate. *Crawford v. Wearn*, 115 N. C. 540, 20 S. E. 724.

⁷² *Steinway v. Steinway*, 163 N. Y. 183, 57 N. E. 312.

⁷³ *Watkins' Adm'r v. Watkins' Ex'rs* (Ky.) 120 S. W. 341; *Foley v. Syer*, 121 Md. 79, 88 Atl. 38; *Peirsol v. Roop*, 56 N. J. Eq. 739, 40 Atl. 124; *Baldwin v. Tucker*, 61 N. J. Eq. 412, 48 Atl. 547; *Lee v. Babcock*, 45 N. J. Eq. 353, 14 Atl. 473, 19 Atl. 622; *In re Eichelberger's Estate*, 135 Pa. 160, 19 Atl. 1006, 1014; *Appeal of Rhein* (Pa.) 8 Atl. 862; *Harris v. Dawley*, 22 R. I. 633, 49 Atl. 29.

⁷⁴ *Wynn v. Bartlett*, 167 Mass. 292, 45 N. E. 752; *In re Morgan*, [1893] 3 Ch. 222.

⁷⁵ *Leake v. Watson*, 60 Conn. 498, 21 Atl. 1075; *In re Noble's Estate*, 182 Pa. 188, 37 Atl. 852; *In re Shade's Estate*, 194 Pa. 599, 45 Atl. 649.

⁷⁶ *Snider v. Snider*, 11 App. Div. 171, 42 N. Y. Supp. 613.

nor by the gift over of the residue remaining at his decease.⁷⁷ But when one is given for life the use of things which are necessarily consumed by their use, the gift is treated as absolute, and any limitation over is void.⁷⁸ However, in order to vest in a legatee an absolute property in such chattels as are consumed in their use, it is generally held that they must be given as a specific, not a general, bequest, and not as a part of the residuum.⁷⁹

Life Estate, with Power of Disposal

A life estate in personal property is not usually enlarged to a fee by a general power of disposition,⁸⁰ and a special power, as of disposal for support, never has this effect.⁸¹ It has been held

⁷⁷ *Bramell v. Adams*, 146 Mo. 70, 47 S. W. 931; *In re Skinner* (1903) 81 App. Div. 449, 80 N. Y. Supp. 1067; *Goudie v. Johnston*, 109 Ind. 427, 10 N. E. 296; *Logue v. Bateman*, 43 N. J. Eq. 434, 11 Atl. 259; *Owens v. Owens*, 64 App. Div. 212, 71 N. Y. Supp. 1108.

But where a testator bequeathed all his property, "real, personal, and mixed," to his wife for life, and "all of the residue of said property" to his children after his wife's death, and a considerable portion of the personalty consisted of crops, stock, and farming implements, and it appeared that all the personalty was needed for the wife's support, she was held to take the personalty absolutely. *In re Markley's Estate*, 132 Pa. 352, 19 Atl. 138.

⁷⁸ *Underwood v. Underwood* (1909) 162 Ala. 553, 50 South. 305, 136 Am. St. Rep. 61; *Seabrook v. Grimes* (1908) 107 Md. 410, 68 Atl. 883, 16 L. R. A. (N. S.) 483, 126 Am. St. Rep. 400; *WHITTEMORE v. RUSSELL*, 80 Me. 297, 14 Atl. 197, 6 Am. St. Rep. 200, *Dunmore Cas. Wills*, 257; *Stuart v. Walker*, 72 Me. 145, 39 Am. Rep. 311; *Merrill v. Emery*, 10 Pick. (Mass.) 507, 512. See *Gibbens v. Gibbens*, 140 Mass. 102, 3 N. E. 1, 54 Am. Rep. 453; *German v. German*, 27 Pa. 116, 67 Am. Dec. 451.

This rule is one of construction only, in aid of the discovery of testator's intention. *In re Gourley's Estate*, 238 Pa. 62, 85 Atl. 999.

⁷⁹ *Covenhoven v. Shuler*, 2 Paige (N. Y.) 122, 21 Am. Dec. 73; *Henderson v. Vaulx*, 18 Tenn. (10 Yerg.) 30; *Bartlett v. Patton*, 33 W. Va. 71, 10 S. E. 21, 5 L. R. A. 523.

The correctness of this requirement may well be doubted, and some courts have refused to distinguish in this connection between a specific bequest and one which is general or residuary. *Seabrook v. Grimes* (1908) 107 Md. 410, 68 Atl. 883, 16 L. R. A. (N. S.) 483, 126 Am. St. Rep. 400, citing *Evans v. Iglehart*, 6 Gill & J. (Md.) 171.

⁸⁰ *Cain v. Cain*, 127 Ala. 440, 29 South. 846; *Webb v. Webb*, 130 Iowa, 457, 104 N. W. 438; *Park v. McCombs*, 146 Ky. 327, 142 S. W. 401; *Martin v. Barnhill* (Ky.) 56 S. W. 160; *Ford v. Ticknor*, 169 Mass. 276, 47 N. E. 877; *Howell v. Shotwell*, 55 N. J. Eq. 824, 41 Atl. 1115; *Bowerman v. Sessel*, 191 Ill. 651, 61 N. E. 369.

Semble: *Sheets v. Wetsel*, 39 Ill. App. 600; *Hughes v. Bank*, 86 Md. 418, 38 Atl. 936; *Seaward v. Davis*, 198 N. Y. 415, 91 N. E. 1107; *Appeal of Linger*, 110 Pa. 398, 1 Atl. 722; *In re Mercur's Estate*, 151 Pa. 49, 24 Atl. 1094.

Contra: *Robertson v. Hardy's Adm'r* (Va.) 23 S. E. 766. See, also, *In re Moehring*, 154 N. Y. 423, 48 N. E. 818.

⁸¹ *Mills v. Bailey*, 88 Md. 320, 41 Atl. 780; *Godshalk v. Akey*, 109 Mich. 350, 67 N. W. 336; *Hunt v. Smith*, 58 N. J. Eq. 25, 43 Atl. 428.

that in a bequest of a fund to a wife for life, "with the right to use and dispose of so much of the principal during her lifetime as she should see fit," the power of disposition was limited to what was in her judgment reasonably necessary for her support.⁸² Where a life estate in personalty is given to a wife, with remainder over in what remained after her death, she has the implied power to use so much of the corpus of the property as may be reasonably necessary for her support.⁸³ Where money is given to one for life, with remainder over, the fact that no trustee was appointed for the protection of the fund does not establish in the legatee an unlimited power of disposition.⁸⁴

Security for Subsequent Takers

Where there is a limitation over on the termination of the life estate, and no provision is made for the appointment of a trustee to hold the fund, the life tenant is entitled to its possession, and security will not ordinarily be required of him for the benefit of subsequent takers until it be shown that there is danger that he will waste, secrete, or remove the property,⁸⁵ though sometimes it is held that security must be given as of course, or a trustee appointed,⁸⁶ and this is occasionally provided for by statute.

Annuities

An annuity is a sum of money, payable at stated and regular intervals, to one and his heirs, or for life or for years.⁸⁷ An annuity is distinguished from an income in that, when the annuity is payable from a specific fund, the fund itself may be applied to its payment when the returns from the fund are insufficient for that purpose, while in the case of an income the principal sum, on failure to furnish the required income, cannot be encroached upon.⁸⁸

⁸² *Terry v. St. Stephen's Protestant Episcopal Church* (1903) 79 App. Div. 527, 81 N. Y. Supp. 119. Contra: *Cain v. Cain*, 127 Ala. 440, 29 South. 846.

⁸³ *Murray v. Kluck*, 87 Wis. 566, 59 N. W. 137. Semble: *In re Geist's Estate*, 193 Pa. 398, 44 Atl. 437; *Smith v. Beardsley*, 2 C. C. A. 118, 51 Fed. 122. See, however, *Bramell v. Adams*, 146 Mo. 70, 47 S. W. 931.

⁸⁴ *Cook v. Collier* (Tenn. Ch. App.) 62 S. W. 658.

⁸⁵ *Bethea v. Bethea*, 116 Ala. 265, 22 South. 561; *In re Garrity's Estate*, 108 Cal. 463, 38 Pac. 628, 41 Pac. 485; *Langworthy v. Chadwick*, 13 Conn. 42; *Homer v. Shelton*, 2 Metc. (Mass.) 194, 206; *Lynde v. Estabrook*, 7 Allen (Mass.) 68; *Chamberlain v. Husel*, 178 Mich. 1, 144 N. W. 549 (remainderman may demand bond or complain only when life tenant goes "beyond the good faith limits"). *Weeks v. Jewett*, 45 N. H. 540; *Hitchcock v. Peaslee*, 145 N. Y. 547, 40 N. E. 211; *Bierce v. Bierce*, 41 Ohio St. 241.

⁸⁶ *WHITTEMORE v. RUSSELL*, 80 Me. 297, 14 Atl. 197, 6 Am. St. Rep. 200, *Dunmore Cas. Wills*, 257.

⁸⁷ *Routt v. Newman*, 253 Ill. 185, 97 N. E. 208.

⁸⁸ *In re Von Keller's Will*, 47 App. Div. 625, 62 N. Y. Supp. 1150; *Peck v. Kinney*, 74 C. C. A. 270, 143 Fed. 76.

If, however, the annuity is, in terms, directed to be paid from the income of

It differs from a rent charge in that the latter is charged upon a particular piece of land, or on land comprised in a general or residuary devise, and is payable from the rents and profits of that particular land only. A gift, however, of a yearly sum, to be paid by the trustee out of the net rents of the realty in his possession and devised to him upon certain trusts, creates an annuity, and is not a devise of rents issuing out of land.⁸⁹

The duration of an annuity will of course be determined by the intent of the testator. When that is uncertain, as when the annuity is given in general terms, it will be presumed to be for the life of the annuitant.⁹⁰ But, where the will provides for the final distribution of the whole estate at a certain time after the testator's death, an annuity given in an earlier portion of the will will be regarded as terminating at that time, though in terms given for the life of the annuitant.⁹¹ An annuity may be granted payable during the life of another,⁹² or for a term of years,⁹³ or until the beneficiary shall reach a certain age.⁹⁴ As the right to an annuity vests at the death of the testator, in the absence of a contrary intention the first payment becomes due one year from the death of the testator,⁹⁵ in the absence of a statute.

A direction to purchase an annuity entitles the beneficiary to receive the principal in lieu thereof, provided the annuity be absolute and unqualified,⁹⁶ and therefore, where the testator directed

a specific fund or estate, the principal cannot then be encroached upon. *Einbecker v. Einbecker*, 162 Ill. 267, 44 N. E. 426.

If the original sum set aside by the executors, in accordance with the directions of the will that a sum sufficient to produce a certain annuity be set aside by them, prove insufficient for that purpose, the deficiency must be made up as against the residuary legatees. *Merritt v. Merritt*, 43 N. J. Eq. 11, 10 Atl. 835.

⁸⁹ *De Haven v. Sherman*, 131 Ill. 115, 22 N. E. 711, 6 L. R. A. 745. *Semble*: *Gillespie v. Boisseau* (Ky.) 64 S. W. 730.

⁹⁰ *Pierrepont v. Edwards*, 25 N. Y. 128; *Armstrong's Appeal*, 63 Pa. 312; *Cleveland v. Cleveland* (Tex. Civ. App.) 30 S. W. 825; *Hedges v. Harpur*, 3 De G. & J. 128, 137.

⁹¹ *ARMSTRONG v. CRAPO*, 72 Iowa, 604, 34 N. W. 437, *Dunmore Cas. Wills*, 210. *Semble*: *In re Charlier*, 22 App. Div. 71, 47 N. Y. Supp. 818.

⁹² *In re Ord*, L. R. 12 Ch. D. 22, 25.

⁹³ *Willcox v. Willcox*, 106 Va. 626, 58 S. E. 588.

So, where trustees were directed to pay a sum annually to a daughter of testatrix to enable her to maintain the family residences devised to her, payments should be discontinued when the properties devised have lost their residential character. *Clark v. Goodridge*, 51 Misc. Rep. 140, 100 N. Y. Supp. 824.

⁹⁴ *Miller v. Miller*, 99 Va. 662, 39 S. E. 597, 86 Am. St. Rep. 919.

⁹⁵ *Kearney v. Cruikshank*, 117 N. Y. 95, 22 N. E. 580; *In re Elchelberger's Estate*, 170 Pa. 242, 32 Atl. 605.

⁹⁶ *Parker v. Cobe* (1911) 208 Mass. 260, 94 N. E. 476, 33 L. R. A. (N. S.) 978, 21 Ann. Cas. 1100.

the purchase for his wife of an annuity for her life, upon her death a few days after testator, her personal representatives were entitled to such a sum as would, at the date of testator's death, have purchased the annuity.⁹⁷

If the annuitant dies between the days of payment, there is no apportionment of the annuity at common law.⁹⁸ But the rule is not applied to an annuity to a widow in lieu of dower or for her support,⁹⁹ or to annuities for the maintenance of infants and married women living apart from their husbands,¹ and statutes have generally been passed providing for apportionment in any event.²

Income

A testator may dispose of the income of his property, separate from and apart from the principal, either expressly or by implication, as where a life estate is given in a fund without power of disposing of the principal, and with limitation over,³ and the fact that the limitation over is to the heirs of the beneficiary to whom is bequeathed the income for life does not serve to increase the interest of such beneficiary.⁴ When some portion of the estate or the residue is given in trust, the interest to be paid to a legatee for life, such interest or income is computed from the testator's death.⁵ A gift of the income from property is interpreted as that of the net income, obtained by deducting from the gross income all necessary charges incurred in the management and preservation of the property.⁶ If the fund is invested in stocks, cash dividends, whether ordinary or special, are commonly treated as income.⁷ But

⁹⁷ *In re Robbins* (1907) 2 Ch. 8, 76 L. J. Ch. N. S. 531, 96 L. T. N. S. 755, 2 B. R. C. 903.

⁹⁸ *Helzer v. Helzer*, 71 Ind. 526, 36 Am. Rep. 202; *Wiggin v. Swett*, 6 Metc. (Mass.) 194, 39 Am. Dec. 716; *Chase v. Darby*, 110 Mich. 314, 68 N. W. 159, 64 Am. St. Rep. 347; *Manning v. Randolph*, 4 N. J. Law, 144; *Clapp v. Astor*, 2 Edw. Ch. (N. Y.) 379.

⁹⁹ *In re Cushing's Will*, 58 Vt. 393, 5 Atl. 186; *In re Lackawanna Iron & Coal Co.*, 37 N. J. Eq. 26; *Blight v. Blight*, 51 Pa. 420. *Semble*: *Sweigart v. Frey*, 8 Serg. & R. (Pa.) 299.

¹ *Clapp v. Astor*, 2 Edw. Ch. (N. Y.) 379; *Lackawanna Iron & Coal Co.'s Case*, 37 N. J. Eq. (10 Stew.) 26.

² *Kearney v. Cruikshank*, 117 N. Y. 95, 22 N. E. 580.

³ *Bullard v. Chandler*, 149 Mass. 532, 21 N. E. 951, 5 L. R. A. 104.

⁴ *In re Dull's Estate*, 217 Pa. 358, 66 Atl. 567.

⁵ *Marsh v. Taylor*, 43 N. J. Eq. 1, 10 Atl. 486.

⁶ *Heard v. Read*, 169 Mass. 216, 47 N. E. 778; *Morse v. Morrell*, 82 Me. 80, 19 Atl. 97.

But where testator bequeathed the "total income" of his estate after deducting taxes, the court held that beneficiary was entitled to the "gross income" less taxes. *Schmidt v. Schmidt*, 80 N. J. Eq. 364, 84 Atl. 629.

⁷ *Rand v. Hubbell*, 115 Mass. 461, 15 Am. Rep. 121; *Gilkey v. Paine*, 80 Me. 319, 14 Atl. 205; *Hopkins' Trusts*, L. R. 18 Eq. 696.

even here it is necessary to distinguish between a genuine cash dividend and a distribution of long accumulated profits under the guise of a cash dividend. Such accumulations are, in reality, as much a part of the capital as any other portion of the estate, and should be treated as a part of the principal from which the income is to arise.⁸ But all profit arising after the testator's death is unquestionably income.⁹ But the distinction between profits which have accumulated before the testator's death, but which have not been divided, and those subsequently accruing, has sometimes been discarded, it being held that all cash dividends declared from the profits go to the person entitled to the income, regardless of the time when they were earned or the size of the dividend by which they were sought to be distributed.¹⁰

In accordance with the sounder rule, if, after the testator's death, the corporation sells a part of its property, and distributes the proceeds in the shape of a cash dividend, that, too, is part of the principal, and is not income to be paid to the life tenant.¹¹ But the money received by the corporation from the sale of property which it has manufactured for the purpose of sale, and distributed as a cash dividend, is income.¹² With regard to so called stock dividends, the decisions are in conflict, but the tendency is to treat them as principal,¹³ and hence such a dividend would not go as income to the beneficiary for life.

⁸ Earp's Appeal, 28 Pa. 368, 375.

⁹ Wiltbank's Appeal, 64 Pa. 256, 3 Am. Rep. 585; Van Doren v. Olden, 19 N. J. Eq. 176, 97 Am. Dec. 650.

¹⁰ Richardson v. Richardson, 75 Me. 570, 46 Am. Rep. 428. See Minot v. Paine, 99 Mass. 101, 96 Am. Dec. 705.

¹¹ Elsner's Estate, 175 Pa. 143, 34 Atl. 577; Vinton's Appeal, 99 Pa. 434, 44 Am. Rep. 116; Wheeler v. Perry, 18 N. H. 307; Gifford v. Thompson, 115 Mass. 478; Taylor, Corp. § 799.

¹² Reed v. Head, 6 Allen (Mass.) 174.

¹³ Minot v. Paine, 99 Mass. 101, 96 Am. Dec. 705; Mills v. Britton, 64 Conn. 4, 29 Atl. 231, 24 L. R. A. 536; Spooner v. Phillips, 62 Conn. 62, 24 Atl. 524, 16 L. R. A. 461; Gibbons v. Mahon, 136 U. S. 549, 10 Sup. Ct. 1057, 34 L. Ed. 525.

Contra: Lowry v. Farmers' Loan & Trust Co., 172 N. Y. 137, 64 N. E. 796; McLouth v. Hunt, 154 N. Y. 179, 48 N. E. 548, 39 L. R. A. 230; Simpson v. Moore, 30 Barb. (N. Y.) 637; Hite's Devisees v. Hite's Ex'r, 93 Ky. 257, 20 S. W. 778, 19 L. R. A. 173, 40 Am. St. Rep. 189; Thomas v. Gregg, 78 Md. 545, 28 Atl. 565, 44 Am. St. Rep. 310; Pritchitt v. Trust Co., 96 Tenn. 472, 36 S. W. 1064, 33 L. R. A. 856.

This is a topic belonging to the law of corporations, rather than of wills. See Clark on Corp. (2d Ed.) pp. 342-346, for a discussion of the rights of one given stock for life or for a term of years.

When an income is given absolutely for the support of the beneficiary, he is entitled to the entire income, whether or no it is actually needful for his maintenance.¹⁴ But where there is merely a gift for maintenance and support, the beneficiary is only entitled to adequate maintenance, and any surplus goes to the testator's estate.¹⁵

¹⁴ *Beard v. Jones*, 45 S. C. 102, 22 S. E. 748; *Craw v. Craw*, 210 Ill. 246, 71 N. E. 450.

¹⁵ *Wentworth v. Fernald*, 92 Me. 282, 42 Atl. 550; *McKnight's Ex'rs v. Walsh*, 24 N. J. Eq. 498.

CHAPTER XVII

CONSTRUCTION (Continued)—VESTED AND CONTINGENT INTERESTS
—REMAINDERS—EXECUTORY DEVISES

- 128-130. Vested and Contingent Interests.
 131-132. Vested Remainders.
 133-134. Contingent Remainders.
 135. Executory Devises.

VESTED AND CONTINGENT INTERESTS

128. A vested interest is one, the right to whose enjoyment, either present or future, is not subject to the happening of a condition precedent.
129. A contingent interest is one, the right to whose enjoyment is subject to the happening of a condition precedent.
130. A devise or legacy will be construed as vested in the absence of a clear intention on the part of the testator to the contrary.

Vested Devises Other than Remainders

These definitions are submitted as substantially accurate,¹ and it has long been an established rule that all estates in land are held to be vested, except estates in the gift of which a condition precedent to the vesting is so clearly expressed that it cannot be treated as vesting, except in direct opposition to the terms of the will;² this because the convenience of the beneficiaries and the interests of society are opposed to the tying up of property and keeping it out of commerce.³ Thus a gift of the residue, to be distributed "under the intestate laws" of a certain state,⁴ or a will directing the divi-

¹ See Hawkins, Wills, 223.

The statement made by Kent, IV, 202, is very frequently quoted. He says: "An estate is vested when there is an immediate right of present enjoyment, or a present fixed right of future enjoyment."

² Duffield v. Duffield, 1 Dow. & Cl. 311; 2 Redf. Wills, 215; Kellett v. Shepard, 139 Ill. 433, 443, 28 N. E. 751, 34 N. E. 254; Gingrich v. Gingrich, 146 Ind. 227, 45 N. E. 101; Crapo v. Price, 190 Mass. 317, 76 N. E. 1043; Bowditch v. Ayrault, 138 N. Y. 223, 33 N. E. 1067; Bigley v. Watson, 98 Tenn. 353, 359, 39 S. W. 525, 38 L. R. A. 679.

³ Gaston, J., in Vanhook v. Vanhook, 21 N. C. 589, 596. See, also, Leighton v. Leighton, 58 Me. 63, 67; Gardiner v. Guild, 106 Mass. 25, 28; Byrnes v. Stillwell, 103 N. Y. 453, 9 N. E. 241, 57 Am. Rep. 760.

⁴ In re McGovran's Estate, 190 Pa. 373, 42 Atl. 705.

sion of the estate among the testator's children, although it authorized the executors to collect the rents and profits,⁵ or a bequest of a sum of money to a legatee "in consideration of her assistance toward myself and my husband, to be performed by her to us during our lives," the legatee surviving the testatrix, but dying before the husband,⁶ creates interests vesting immediately upon the death of the testator.

To effectuate the general rule, words of seeming condition are, if possible, held to have only the effect of postponing the right of possession. Thus, if real estate be devised to one when he shall attain a given age, the property to go to another until that age is attained, the first devisee takes an immediate vested estate, not defeasible on his death under the specified age;⁷ and the rule is the same if the devise be to one "at," "upon," or "from and after" attaining a certain age, with a devise in the meantime to another.⁸ But a devise to one when he shall attain a certain age, standing alone and not preceded by any immediate interest, would be contingent,⁹ as would also a gift in the form of a direction to trustees to convey to a beneficiary at a certain age.¹⁰

Where there is no intermediate beneficial taker, a devise of land providing that it shall be sold upon the maturity of the devisees, and the proceeds equally divided between them, creates a present vested interest in fee.¹¹

If the devise is clearly conditional, the condition will, if possible, be construed as a condition subsequent, and not precedent, so as to confer an immediate vested estate, subject to defeat on the happening of the contingency.¹² Thus, if land be devised to one if or when he shall reach a certain age, with limitation over in event of his dying under that age, the attainment of the specified age is a condition subsequent, and the first beneficiary takes an immediate vested estate, defeasible upon his death under the specified age;¹³

⁵ *Brown v. Brown*, 27 App. Div. 45, 50 N. Y. Supp. 185.

⁶ *McCarty v. Fish*, 87 Mich. 48, 49 N. W. 513.

⁷ *Scott v. Logan*, 23 Ark. 352; *Austin v. Bristol*, 40 Conn. 120, 16 Am. Rep. 23; *Daniels v. Eldredge*, 125 Mass. 356; *Roome v. Phillips*, 24 N. Y. 465; *Kinsey v. Lardner*, 15 Serg. & R. (Pa.) 196; *Boraston's Case*, 3 Co. 21a; *Goodtitle v. Whitby*, 1 Burr. 228; *Doe dem. Cadogan v. Ewart*, 7 Ad. & El. 636.

⁸ *Hooker v. Bryan*, 140 N. C. 402, 53 S. E. 130.

⁹ *In re Francis*, [1905] 2 Ch. 295, 74 L. J. Ch. 487; *Briscoe's Devisees v. Wickliffe*, 6 Dana (Ky.) 161; *Bigelow v. Bigelow*, 19 Grant, Ch. 549.

¹⁰ *Walker v. Mower*, 16 Beav. 365.

¹¹ *Hogan v. Hogan*, 102 Mich. 641, 61 N. W. 73.

¹² *Sherman v. American Congregational Ass'n*, 51 C. O. A. 829, 113 Fed. 609.

¹³ *Bowman v. Long*, 23 Ga. 247; *Weston v. Weston*, 125 Mass. 268; *Hersey*

and the same rule applies to bequests of personalty.¹⁴ The rule is the same if the devise be to one "at," "upon," or "from and after" attaining a given age, with limitation over, and when the devise is to a class.¹⁵ But where the attainment of the given age is made a part of the description of the beneficiary, as to such child of A. as shall attain twenty-one,¹⁶ or to several as they come to be of a certain age,¹⁷ the devise is *prima facie* contingent, even though there be a gift over in default of the specified children. But a devise to one, provided he attain a certain age, has been held to be vested, defeasible on his death before reaching the specified age.¹⁸ Where a devise is made to specified beneficiaries, the postponement of the period of distribution will not render their interests contingent upon their survivorship to that period, in the absence of a clear intent of the testator to that end.¹⁹ Thus, where the testator created a trust in his property, to be terminated at a fixed time, when it was to be equally divided between a father and his children, and the father died after the testator, but before the termination of the trust, his interest was not defeated, since the devise vested at the death of the testator.²⁰ Where there is a limitation over in event of the non-survivorship of the beneficiaries to the period of distribution, they then take a vested, defeasible interest.²¹ Where the gift is made to a class, the interest vests in the class at the death of the testator, subject to open and let in members of the class who may

v. Purlington, 96 Me. 166, 51 Atl. 865; *Phipps v. Ackers*, 9 Cl. & F. 583; *Doe dem. Roake v. Nowell*, 5 Daw. 202; *Edwards v. Hammond*, 1 B. & P. N. R. 324; *Bromfield v. Crowder*, 1 B. & P. N. R. 313.

¹⁴ *Von der Horst v. Von der Horst*, 88 Md. 127, 41 Atl. 124; *Dusenberry v. Johnson*, 59 N. J. Eq. 336, 45 Atl. 103.

¹⁵ *Hawkins*, Wills, 241.

¹⁶ *Festing v. Allen*, 12 M. & W. 279; *Bull v. Pritchard*, 5 Hare, 567; *Duffield v. Duffield*, 1 Dow & Cl. 268; *Holmes v. Prescott*, 33 L. J. Ch. 264; *Campbell v. Robertson*, 62 Ga. 709; *Webb v. Webb*, 92 Md. 101, 48 Atl. 95, 84 Am. St. Rep. 499, 6 Prob. Rep. Ann. 280.

¹⁷ *In re Blake's Estate*, 157 Cal. 448, 108 Pac. 287.

¹⁸ *Simmonds v. Cock*, 29 Beav. 455. See *Rush v. Rush*, 40 Ind. 83; *Foster v. Wick's Lessee*, 17 Ohio, 250. Contra: *High v. Pollock*, 114 Md. 580, 80 Atl. 43.

¹⁹ *Andrews v. Russell*, 127 Ala. 195, 28 South. 703; *McConnell v. Stewart*, 169 Ill. 374, 48 N. E. 201; *Brookhouse v. Pray*, 92 Minn. 448, 100 N. W. 235; *Thomson v. Hill*, 87 Hun, 111, 33 N. Y. Supp. 810; *Wells v. Houston*, 23 Tex. Civ. App. 629, 57 S. W. 584.

²⁰ *Mitchell v. Mitchell*, 73 Conn. 303, 47 Atl. 325. Semble: *Safe Deposit & Trust Co. v. Wood*, 201 Pa. 420, 50 Atl. 920; *Sellers' Ex'r v. Reed*, 88 Va. 377, 13 S. E. 754.

²¹ See *Andrews v. Russell*, 127 Ala. 195, 28 South. 703; *Baxter v. Isaacs* (Ky. 1903) 71 S. W. 907.

come into being subsequent to the testator's death, and prior to the time of distribution or enjoyment.²²

Vested Legacies

Here, as in the case of devises, the law favors the vesting of the gift, and will so construe it unless such construction will do violence to the language in which the testator has clothed his intent.²³ Still, a bequest of personal property to one "at" a given age or marriage,²⁴ or "upon" attaining a given age,²⁵ or "when" or "as" he shall attain a given age,²⁶ is *prima facie* contingent.²⁷ In other words, time is here of the substance of the gift, and is referred to as an element in the description of the beneficiary. A party, therefore, can take nothing under the gift until he brings himself within the description.²⁸ The same rule applies where the bequest is to a class, as to children at or upon attaining, or when or as they shall attain a given age.²⁹ But where the gift and the direction as to payment are distinct (i. e., where there is a gift and a direction as to the time of payment),³⁰ the fact that the latter is postponed obviously cannot affect the vesting of the former, and the bequest will not fail in case the beneficiary dies before the time of payment, but the interest will pass to his personal representatives in case there is no limitation over. Such a separation of the gift and the time of payment is steadily held to exist when a legacy is given to a bene-

²² See *Mitchell v. Mitchell*, 73 Conn. 303, 47 Atl. 325 (where a trust in the testator's property was to terminate at a certain time, and the property was then to be divided between N. and his children. Held, that a child born between the time of the testator's death and the termination of the trust would share in the property); *Haggerty v. Hockenberry*, 52 N. J. Eq. 354, 30 Atl. 88.

²³ *Foster v. Holland*, 56 Ala. 476.

²⁴ *Stapleton v. Cheales*, Prec. Ch. 317.

A gift over on the marriage of the first taker is sometimes extended by implication to take effect at his death unmarried and is then treated as vested. *Trenton Trust & Safe Deposit Co. v. Armstrong*, 70 N. J. Eq. 572, 62 Atl. 456.

²⁵ *Leake v. Robinson*, 2 Mer. 363; *Travis v. Morrison*, 28 Ala. 494; *In re Ehle* (D. C.) 109 Fed. 625.

²⁶ *Hanson v. Graham*, 6 Ves. 239; *Leake v. Robinson*, 2 Mer. 363; *Foster v. Holland*, 56 Ala. 474; *Allen v. Whitaker*, 34 Ga. 6; *Snow v. Snow*, 49 Me. 159; *Major's Ex'r v. Major's Adm'r*, 32 Grat. (Va.) 819.

Contra: *Nelson v. Pomeroy*, 64 Conn. 257, 29 Atl. 534.

²⁷ *Hawkins, Wills*, 223.

²⁸ *Adams v. Woolman*, 50 N. J. Eq. 516, 520, 26 Atl. 451; *Perrine v. Newell*, 49 N. J. Eq. 57, 23 Atl. 492; *Peckham v. Gregory*, 4 Hare, 398. As where a bequest is given to each of the testator's grandsons who "might live to reach" a certain age. *Webb v. Webb*, 92 Md. 101, 48 Atl. 95, 84 Am. St. Rep. 499.

²⁹ *Hawkins, Wills*, 223; *Leake v. Robinson*, 2 Mer. 363.

³⁰ See *Bigelow, Wills*, 257, and *Crawford v. Engram* (1907) 153 Ala. 420, 45 South. 584.

"A bequest to A. at twenty-one, and a bequest to A. payable at twenty-one,

ficiary payable at or to be paid at³¹ or after arriving at a certain age.³² So a legacy to be paid after the death of the testator's wife is a vested legacy,³³ as is also one to be paid from the proceeds of a sale of realty,³⁴ though such sale is not to be had until after the death of certain relatives of the testator,³⁵ or from the sale of property held in trust, and to be sold at such time as should seem to the trustees most expedient.³⁶ So words directing distribution among certain specified individuals, not forming a class, when they or one of them shall arrive at a certain age, being equivalent to a direction to pay, come within the same rule.³⁷ And in general, where there is no gift except by a direction to divide at a future time, the legacy will be construed to be vested if an intent to that end is fairly inferable from the whole will.³⁸

But all hinges upon the intention of the testator, and though the gift and the direction to pay be, in form, distinct, the context may show that the vesting is to be postponed until the time of payment;

do not much differ in expression; yet one is a vested, the other a contingent gift." *Hawkins, Wills*, 225, cited and approved in *Post v. Herbert's Ex'rs*, 27 N. J. Eq. 540, 546.

³¹ *WARDWELL v. HALE*, 161 Mass. 396, 37 N. E. 196, 42 Am. St. Rep. 413, *Dunmore Cas. Wills*, 260; *Fox v. Hicks*, 81 Minn. 197, 83 N. W. 538, 50 L. R. A. 663; *In re Lehman*, 2 App. Div. 531, 37 N. Y. Supp. 1086; *Zartman v. Ditmars*, 37 App. Div. 173, 55 N. Y. Supp. 908; *Sawyer v. Cubby*, 146 N. Y. 192, 40 N. E. 869; *Smith v. Parsons*, 146 N. Y. 116, 40 N. E. 736; *In re Smith's Estate*, 189 Pa. 587, 42 Atl. 522; *In re Murphy*, 144 N. Y. 557, 39 N. E. 691; *McReynolds v. Graham* (Tenn. Ch. App.) 43 S. W. 138; *Silvers v. Canary*, 114 Ind. 129, 16 N. E. 166; *Benton v. Benton*, 66 N. H. 169, 20 Atl. 365.

³² *Webb v. Webb*, 92 Md. 101, 48 Atl. 95, 84 Am. St. Rep. 499; *In re Smith's Estate*, 226 Pa. 304, 75 Atl. 425.

³³ *Bryant v. Flanders*, 201 Mass. 373, 87 N. E. 574; *Owens v. Owens*, 64 App. Div. 212, 71 N. Y. Supp. 1108; *Hall v. Wiggin*, 67 N. H. 89, 29 Atl. 671. *Semble*: *Daughters v. Lynch*, 93 Md. 305, 48 Atl. 1055.

³⁴ *Chanler v. New York El. R. Co.*, 34 App. Div. 305, 54 N. Y. Supp. 341; *Huber v. Donoghue*, 49 N. J. Eq. 125, 23 Atl. 495.

³⁵ *Spencer v. Greene*, 17 R. I. 727, 24 Atl. 742.

³⁶ *Bates v. Spooner* (1903) 75 Conn. 501, 54 Atl. 305.

³⁷ *Herriot v. Prime*, 155 N. Y. 5, 49 N. E. 142; *May v. Wood*, 3 Bro. C. C. 471; *Verrill v. Weymouth*, 68 Me. 318; *Shattuck v. Stedman*, 2 Pick. (Mass.) 468; *Teele v. Hathaway*, 129 Mass. 164; *Brown v. Brown*, 44 N. H. 281.

³⁸ *Armstrong v. Barber*, 239 Ill. 389, 88 N. E. 246; *Carr v. Smith*, 161 N. Y. 636, 57 N. E. 1106.

Thus, where a will contained no words of gift or devise, but only a direction to pay to the testator's children or grandchildren on the sale of property after certain stated times, and the other provisions of the will showed that the postponement of the payment was not to await the happening of any event qualifying the legatees, but only to keep the estate undisturbed, that the testator's wife might be assured a comfortable support during life, the legatees acquired a vested interest on the death of the testator. *McLaughlin v. Penney*, 65 Kan. 523, 70 Pac. 341.

as in a bequest to one payable at a certain age if or in case he attains that age.³⁹

Even though words be not used which would of themselves vest the legacy, yet a provision that interest shall be payable to the legatee until the time when the legacy itself becomes payable is *prima facie* indicative of an intent that the latter is to be vested, and not contingent,⁴⁰ as where a sum is bequeathed to a legatee "when he shall arrive at" a certain age, "the said sum to be loaned and the interest thereon" paid to the legatee.⁴¹ The rule is the same where the interest is given to other persons to be used for the benefit of the legatee.⁴² But a discretionary power, given to the trustees of a fund, to apply all or any part of the income towards the maintenance or education or for the benefit of the legatee, will not serve to vest the principal,⁴³ nor will a gift of a fixed sum for maintenance.⁴⁴ If, however, the whole interest is to be paid as maintenance, it is none the less interest, whose bestowal indicates an intent that the legacy shall be vested.⁴⁵

A rule much quoted, and whose essence is contained in the preceding discussion, is that if payment be postponed for the convenience of the estate, or to let in some other interest, a bequest in the form of a direction to pay or divide at a future period vests immediately,⁴⁶ as under a bequest to trustees in trust for one during life,

³⁹ *Knight v. Cameron*, 14 Ves. 389; *Lister v. Bradley*, 1 Hare, 12; *Colby v. Doty*, 158 N. Y. 323, 53 N. E. 35. See *Furness v. Fox*, 1 Cush. (Mass.) 135, 48 Am. Dec. 593.

⁴⁰ *Nixon v. Robbins*, 24 Ala. 669; *Dale v. White*, 33 Conn. 294; *Fuller v. Winthrop*, 3 Allen (Mass.) 51, 60; *Appeal of Reed*, 118 Pa. 215, 11 Atl. 787, 4 Am. St. Rep. 588; *Toms v. Williams*, 41 Mich. 552, 2 N. W. 814; *Christofferson v. Pfennig*, 16 Wash. 491, 48 Pac. 264; *In re Wintle*, [1896] 2 Ch. 711.

⁴¹ *Harris v. Cook* (1903) 98 Mo. App. 38, 71 S. W. 1126.

⁴² *Hawkins, Wills*, 227; *Hanson v. Graham*, 6 Ves. 239; *Hammond v. Maule*, 1 Coll. 281; *Roberts' Appeal*, 59 Pa. 70, 98 Am. Dec. 312.

⁴³ *Hawkins, Wills*, 229; *Pulsford v. Hunter*, 3 Bro. C. C. 146; *Leake v. Robinson*, 2 Mer. 363.

In *Kelly v. Dike*, 8 R. I. 436, 451, the court quotes with approval 2 Redfield on Wills, 613, where it is said that a gift of a portion of income, especially in the discretion of trustees, affords "a less conclusive ground of inference in favor of the estate vesting, but still one of very considerable weight."

⁴⁴ *Watson v. Hayes*, 4 Jur. 186, 9 L. J. Ch. 49, 5 Myl. & C. 125, 46 Eng. Ch. 114, 41 Eng. Reprint, 319.

⁴⁵ *Bayard v. Atkins*, 10 Pa. 20.

⁴⁶ *Bethea v. Bethea*, 116 Ala. 265, 22 South. 561; *Armstrong v. Barber*, 239 Ill. 389, 88 N. E. 246; *Cook v. Hayward*, 172 Mass. 195, 51 N. E. 1075; *Hall v. Wiggin*, 67 N. H. 89, 29 Atl. 671; *Cook v. McDowell*, 52 N. J. Eq. 351, 30 Atl. 24; *In re Murphy*, 144 N. Y. 557, 39 N. E. 691; *Bowditch v. Ayrault*, 138 N. Y. 222, 33 N. E. 1067; *Collier v. Grimesey*, 36 Ohio St. 22; *Appeal of Ritter*, 190 Pa. 102, 42 Atl. 384; *Little's Appeal*, 117 Pa. 14, 11 Atl. 520; *Leem-*

and on his death to pay and divide among his children, the shares of the latter being vested, and passing, in event of their death during the life of the first taker, to their legal representatives.⁴⁷ In such cases the time plainly refers to the time of enjoyment, and cannot well be interpreted as descriptive of the legatees who are to take.⁴⁸

The foregoing rules do not apply to legacies charged upon land. Such legacies do not vest before the time of payment unless an intention appear to the contrary;⁴⁹ hence they lapse if the legatee die before the time of payment.⁵⁰ The rule is the same though interest be given in the meantime.⁵¹

Contingent Interests Other than Remainders

But, as has been seen, contingent interests may be created, and the favor shown to vested interests is never pressed so far as to defeat the intention of the testator.⁵² The contingency may be the happening of a certain event, such as the defeat of a previous interest upon which the limitation over depends,⁵³ or a change in the character of the beneficiary,⁵⁴ or the exercise of a power by a trustee,⁵⁵ or the survivorship of the testator by the beneficiary,⁵⁶ or the

ing v. Sherratt, 2 Hare, 14; Hallifax v. Wilson, 16 Ves. 171; Packham v. Gregory, 4 Hare, 396.

⁴⁷ Hawkins, Wills, 232.

⁴⁸ See Packham v. Gregory, 4 Hare, 398.

⁴⁹ Poulett v. Poulett, 1 Vern. 204; Remnant v. Hood, 2 De G., F. & J. 396; Roberts v. Malin, 5 Ind. 18; McDowell v. Stiger, 58 N. J. Eq. 125, 42 Atl. 575.

In Birdsall v. Hewlett, 1 Paige (N. Y.) 32, 19 Am. Dec. 392, the court intimates that this rule was adopted for the benefit of the heir at law and should not be extended to the case of a gift to a stranger upon the express condition that he pay a legacy charged thereon. This, however, was denied in Garland v. Smiley, 51 N. J. Eq. 198, 26 Atl. 164.

⁵⁰ Garland v. Smiley, supra; Spence v. Robins, 6 Gill & J. (Md.) 507, 26 Am. Dec. 587; Harris v. Fly, 7 Paige (N. Y.) 421.

⁵¹ Hawkins, Wills, 234; Pearce v. Loman, 3 Ves. 135; Parker v. Hodgson, 1 Dr. & Sm. 568.

⁵² Wallace v. Foxwell, 250 Ill. 616, 95 N. E. 985, 50 L. R. A. (N. S.) 632; High v. Pollock, 114 Md. 580, 80 Atl. 48 (where legacy held contingent although legatee entitled to interest until legacy payable); Poultney v. Tiffany, 112 Md. 630, 77 Atl. 117.

⁵³ See Calvin v. Springer, 28 Ind. App. 443, 63 N. E. 40; Baird v. Winstead, 123 N. C. 181, 31 S. E. 390; Carr v. Bredenberg, 50 S. C. 471, 27 S. E. 925; In re Kennedy's Estate, 190 Pa. 79, 42 Atl. 459; Perkins v. Fisher, 59 Fed. 901, 8 C. C. A. 270.

⁵⁴ Markham v. Hufford, 123 Mich. 505, 82 N. W. 222, 48 L. R. A. 580, 81 Am. St. Rep. 222.

⁵⁵ Crist v. Schank, 146 Ind. 277, 45 N. E. 190.

⁵⁶ Oetjen v. Dlemmer, 115 Ga. 1005, 42 S. E. 388.

profitable character of certain of the testator's investments,⁵⁷ or the death of another than the beneficiary without issue.⁵⁸ So the contingency may result from uncertainty as to the beneficiary, as in the case of bequests to unborn beneficiaries,⁵⁹ or to a class whose members are to be ascertained at a future time, as to the children of one, when the youngest child attains a certain age. Here the bequest vests in all the children who reach the age, to the prima facie exclusion of those dying under that age.⁶⁰ The gift of the income of the fund for the benefit of the children until the time for distribution does not avoid the rule,⁶¹ which, however, does not apply when the gift is to the children as individuals, and not as a class.⁶²

VESTED REMAINDERS

131. A vested remainder is one limited to a certain person on a certain event, viz., the termination of the particular estate, in such manner that the remainderman has present capacity to take possession should the possession become immediately vacant.

132. The tendency of courts to favor vested rather than contingent interests finds marked illustration in the construction of remainders.

The present capacity for taking effect in possession, as the above definition indicates,⁶³ is the test generally adopted, though not in every instance inexorably applied, in distinguishing a vested remainder from one that is contingent.⁶⁴ It is sometimes made, by

⁵⁷ In re Patterson's Estate, 173 Pa. 185, 34 Atl. 117.

⁵⁸ Farmers' Loan & Trust Co. v. Ferris, 67 App. Div. 1, 73 N. Y. Supp. 475.

⁵⁹ Carney v. Kain, 40 W. Va. 758, 23 S. E. 650.

⁶⁰ McClain v. Capper, 98 Iowa, 145, 67 N. W. 102 (here, under a clause in a will reciting, "When my youngest child arrives at full age, I desire that the real estate be equally divided between my children, their heirs," it was held that such children took no vested interest in the land until the youngest child attained majority, and that a devise of her interest therein by one who died before that time passed no title); Dohn's Ex'r v. Dohn, 110 Ky. 884, 62 S. W. 1033, 64 S. W. 352; Garman v. Hawley (1903) 132 Mich. 321, 93 N. W. 871; Anderson v. Felton, 36 N. C. 55; Leeming v. Sherratt, 2 Hare, 14; Parker v. Lowerby, 1 Drew. 488; Lloyd v. Lloyd, 3 K. & J. 20; Cooper v. Cooper, 29 Beav. 229.

⁶¹ Garman v. Hawley (1903) 132 Mich. 321, 93 N. W. 871; Cooper v. Cooper, 29 Beav. 229.

⁶² Cooper v. Cooper, 29 Beav. 229.

⁶³ Crews' Adm'r v. Hatcher, 91 Va. 378, 21 S. E. 811.

⁶⁴ Fearn, Cont. Rem. 216; Nelson v. Nelson, 36 Ind. App. 331, 75 N. E.

statute, the definition of a vested estate.⁶⁵ Applying this test, it has been held that where an estate is, in terms, limited over to remaindermen who shall survive the tenant for life, the remainder is vested, defeasible on the happening of the condition subsequent, viz., their death prior to the termination of the life estate.⁶⁶ In view, however, of the naturally intrinsically contingent character of limitations of this description, courts have usually declined to treat them as vested.⁶⁷ A remainder after an estate tail is vested, if it depends on nothing but the termination of the preceding estate.⁶⁸ A child en ventre sa mere is deemed to be in esse for the purpose of taking a remainder.⁶⁹

The law presumes that words postponing the enjoyment of an estate in remainder relate to the beginning of the enjoyment, and not to the vesting of the estate,⁷⁰ and words of devise will be so

679; *Archer v. Jacobs*, 125 Iowa, 467, 101 N. W. 195; *Dougherty v. Thompson*, 167 N. Y. 472, 60 N. E. 760; *Moore's Adm'r v. Sleet*, 113 Ky. 600, 68 S. W. 642; *Allison v. Allison's Ex'rs*, 101 Va. 537, 44 S. E. 904, 63 L. R. A. 920.

A particular estate for life is not regarded as terminated, where the life tenant is sentenced to imprisonment for life, and the statute provides that a person so sentenced "shall thereafter be deemed civilly dead," so as to vest the right of possession in the remainderman. *Avery v. Everett*, 110 N. Y. 317, 18 N. E. 148, 1 L. R. A. 264, 6 Am. St. Rep. 368 (Earl, J., dissenting).

⁶⁵ 4 Rev. St. N. Y. (8th Ed.) p. 2432, pt. 2, tit. 2, art. 1, § 13, construed in *re Davis' Estate*, 91 Hun, 53, 36 N. Y. Supp. 822; *Van Axte v. Fisher*, 117 N. Y. 401, 22 N. E. 943; *In re Traver*, 161 N. Y. 54, 55 N. E. 406; *Canfield v. Fallon*, 44 App. Div. 631, 60 N. Y. Supp. 1134; *Minot v. Minot*, 17 App. Div. 521, 45 N. Y. Supp. 554.

How. Ann. St. Mich. § 5551, construed in *Hovey v. Nellis*, 98 Mich. 374, 57 N. W. 255.

Rev. St. Wis. 1878, § 2037, construed in *Smith v. Smith* (1903) 116 Wis. 570, 93 N. W. 452.

⁶⁶ *Bethea v. Bethea*, 116 Ala. 265, 22 South. 561 (where property was bequeathed to the testator's wife for life, then to his three sons for life, "then to the children that each may have surviving him," it being held that the interests of the children were vested); *Acree v. Dabney*, 133 Ala. 437, 32 South. 127; *Smith v. Lawrence*, 66 Hun, 362, 21 N. Y. Supp. 379; *In re Brennan*, 21 App. Div. 236, 47 N. Y. Supp. 661; *Connelly v. O'Brien*, 166 N. Y. 406, 60 N. E. 20, reversing 40 App. Div. 574, 58 N. Y. Supp. 45 (here the estate was given to the testator's widow for life, "and then to such of my children as may then be alive, share and share alike." Held, that the children took a vested remainder); *In re Seaman's Estate*, 147 N. Y. 69, 41 N. E. 401. *Semble*: *Chace v. Gregg*, 88 Tex. 552, 32 S. W. 520.

⁶⁷ See post, p. 452.

⁶⁸ *Smith & Dormer v. Parkhurst*, 18 Viner's Abr. 413. See, also, *Taylor v. Taylor*, 63 Pa. 481, 485, 3 Am. Rep. 565.

⁶⁹ *Craig v. Rowland*, 10 App. D. C. 402.

⁷⁰ *Moore v. Gary*, 149 Ind. 51, 48 N. E. 630; *Gray v. Whittemore*, 192 Mass. 367, 78 N. E. 422, 10 L. R. A. (N. S.) 1143, 116 Am. St. Rep. 246.

So, where land was devised to one for life and "at his death to his chil-

construed as to prevent the title to real estate from remaining contingent; and, in the absence of plain indications of a contrary intent, the law will treat the entire title as vested in those claiming under the will, rather than in abeyance.⁷¹ Thus, where land is devised for life, with remainder over to specified beneficiaries, the interest of the latter vests immediately on the death of the testator;⁷² and, in case a remainderman dies before the termination of the life estate, his heirs or personal representatives will succeed to his interest;⁷³ and so with a remainder after an estate devised to one so long as she may remain a widow.⁷⁴ The gift over is construed as intended to take effect in possession upon the marriage of the widow, but not as contingent or dependent upon the marriage.⁷⁵

The doctrine that vested rather than contingent interests are favored is further illustrated by the rule applied in some cases that, where words of survivorship are used in describing the remaindermen, they are made to refer, in cases of doubt, to the death of the testator, in order to vest the remainder.⁷⁶ Thus, where an estate was given to the testator's son O. during his natural life, and, in event of his dying, leaving no child of his own, to the testator's "surviving child or grandchildren, in equal parts," the children and grandchildren living at the testator's death were held to take the

dren," the word "at" designated the time of enjoyment merely, and not the time of vesting. *Manhattan Real Estate & Bldg. Ass'n v. Cudlipp*, 80 App. Div. 532, 80 N. Y. Supp. 993. Accord: *Burke v. Barrett*, 31 Ind. App. 635, 67 N. E. 552.

⁷¹ *Mettler v. Warner*, 243 Ill. 600, 90 N. E. 1099, 134 Am. St. Rep. 388; *Wills v. Wills*, 85 Ky. 486, 3 S. W. 900; *Hale v. Hobson*, 167 Mass. 397, 400, 45 N. E. 913; *Knowlton v. Sanderson*, 141 Mass. 323, 6 N. E. 228; *Marsh v. Hoyt*, 161 Mass. 459, 37 N. E. 454; *Peck v. Carlton*, 154 Mass. 231, 28 N. E. 166; *Gingrich v. Gingrich*, 146 Ind. 227, 45 N. E. 101; *Stokes v. Weston*, 142 N. Y. 433, 37 N. E. 515; *Chapman v. Chapman*, 90 Va. 409, 18 S. E. 913; *Moore's Adm'r v. Sleet*, 113 Ky. 600, 68 S. W. 642.

⁷² *Cody v. Staples*, 80 Conn. 82, 67 Atl. 1; *Sumpter v. Carter*, 115 Ga. 893, 42 S. E. 324, 60 L. R. A. 274; *Northern Trust Co. v. Wheaton*, 249 Ill. 606, 94 N. E. 980, 34 L. R. A. (N. S.) 1150; *Hill v. True*, 104 Wis. 294, 80 N. W. 462.

⁷³ *In re Journey's Estate*, 7 Del. Ch. 1, 44 Atl. 795; *Well v. King*, 31 Ky. Law Rep. 1010, 104 S. W. 380; *In re Tucker's Will*, 63 Vt. 104, 21 Atl. 272, 25 Am. St. Rep. 743.

⁷⁴ *Gillespie v. Allison*, 115 N. C. 542, 20 S. E. 627.

⁷⁵ *Earnshaw v. Daly*, 1 App. D. C. 218; *Sumpter v. Carter*, 115 Ga. 893, 42 S. E. 324, 60 L. R. A. 274; *McKensey v. McKensey's Ex'r* (Ky.) 28 S. W. 782; *Shangle v. Hallock*, 6 App. Div. 55, 39 N. Y. Supp. 619; *Sullivan v. Jones*, 129 N. C. 442, 40 S. E. 113; *Savings Bank of Newport v. Hayes*, 18 R. I. 464, 28 Atl. 966.

Semble: *Myers v. Adler*, 6 Mackey (D. C.) 515, 1 L. R. A. 432.

⁷⁶ *Clanton v. Estes*, 77 Ga. 352, 1 S. E. 163; *Allison v. Allison's Ex'rs*, 101 Va. 537, 44 S. E. 904, 63 L. R. A. 920.

remainder in fee, defeasible on O.'s dying, leaving legitimate children.⁷⁷ But, in the greater number of cases, where there is a gift over in remainder to survivors, the period of survivorship is referred to the time of the termination of the particular estate.⁷⁸ So, where the devise was, "should my wife marry or die, the land then shall be divided among my surviving sons," the moment of survivorship was held to be fixed at the death or marriage of the wife; and, until that happened, it was contingent who the persons were to be who could take as surviving sons.⁷⁹ So, where the testator bequeathed a medal to his wife for life, then to be handed down to the testator's oldest surviving daughter successively, then to his "oldest grandson living," these words were held to refer to the time of the decease of the testator's oldest daughter, and not that of the testator.⁸⁰

Another important rule in this connection, as formulated by Professor Bigelow,⁸¹ is that "where the testator has created a particular estate, and then has gone on to dispose of the ulterior interest expressly in an event which will determine the prior estate, the words descriptive of such event, occurring in the ulterior gift, will, if reasonably possible, be construed as referring merely to the time of the determination of the possession or enjoyment under the prior gift, rather than as intended to postpone the vesting." Thus, where the gift was in trust for A. during minority, absolutely on his becoming of age, but, if A. should die before attaining his majority, then to specified beneficiaries, the interests of the latter were held not to be contingent upon A.'s so dying, but they were held to vest, in right, at the testator's death;⁸² and so with a devise of land to C. during his lifetime, "provided he will live on and occupy the same," and, at his death or refusal to occupy, then "to the said C.'s lawful heirs,"⁸³ and to a granddaughter," and, in case she should die without

⁷⁷ *Kilgore v. Kilgore*, 127 Ind. 276, 26 N. E. 56. For similar cases, see *Tindall v. Miller*, 143 Ind. 337, 41 N. E. 535; *Evans v. Henderson* (Ky.) 68 S. W. 640; *Stone v. Bradley* (1903) 183 Mass. 165, 66 N. E. 708; *Eldridge v. Eldridge*, 9 Cush. (Mass.) 516; *Moore v. Lyons*, 25 Wend. (N. Y.) 119; *Chew's Appeal*, 37 Pa. 23; *Manderson v. Lukens*, 23 Pa. 31, 62 Am. Dec. 312; *Nichols v. Guthrie* (1903) 109 Tenn. 535, 73 S. W. 107.

⁷⁸ *Ridgely v. Ridgely*, 100 Md. 230, 59 Atl. 731; *Dary v. Grau*, 190 Mass. 482, 77 N. E. 507; 11 Prob. Rep. Ann. 650; *Coveny v. McLaughlin*, 148 Mass. 576, 20 N. E. 165, 2 L. R. A. 448; *Sullivan v. Garesche*, 229 Mo. 496, 129 S. W. 949, 49 L. R. A. (N. S.) 605; *Mullarky v. Sullivan*, 136 N. Y. 227, 32 N. E. 762.

⁷⁹ *Olney v. Hull*, 21 Pick. (Mass.) 311; *In re Ryder*, 11 Paige (N. Y.) 185, 42 Am. Dec. 109.

⁸⁰ *Jaudon v. Hayes*, 79 Hun, 453, 29 N. Y. Supp. 958.

⁸¹ Bigelow, *Wills*, 246.

⁸² *Barker v. Southerland*, 6 Dem. Sur. (N. Y.) 220.

⁸³ *Conger v. Lowe*, 124 Ind. 368, 24 N. E. 889, 9 L. R. A. 165. Held to create

issue, then over to testator's children.⁸⁴ The same principle is illustrated by the steadily recognized rule that where a particular estate is given, followed by a limitation over to beneficiaries at the expressly mentioned termination thereof, as where an estate is given to the testator's wife for life, and at her death the property to belong to and be equally divided among his daughters and their heirs,⁸⁵ the remainder vests upon the death of the testator, and is not contingent until the termination of the particular estate.⁸⁶

a vested remainder in the children of C., who at once became entitled to possession when C. sold and delivered the property to a stranger.

⁸⁴ *Ramsay v. De Remer*, 65 Hun, 212, 20 N. Y. Supp. 143. *Semble*: *Dana v. Sanborn*, 70 N. H. 152, 46 Atl. 1053.

⁸⁵ *Burton v. Provost* (1903) 75 Vt. 199, 54 Atl. 189.

⁸⁶ The following cases rigorously apply this rule: *In re Fair's Estate*, 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70; *Johnes v. Beers*, 57 Conn. 295, 18 Atl. 100, 14 Am. St. Rep. 101; *Doe dem. Wright v. Gooden*, 6 Houst. (Del.) 397; *Hauptman v. Carpenter*, 16 App. D. C. 524; *Marshall v. Augusta*, 5 App. D. C. 183; *Chewning v. Shumate*, 106 Ga. 751, 32 S. E. 544; *Clanton v. Estes*, 77 Ga. 352, 1 S. E. 163; *Hudgens v. Wilkins*, 77 Ga. 555; *Crawley v. Blackman*, 81 Ga. 775, 8 S. E. 533; *De Vaughn v. McLeroy*, 82 Ga. 687, 10 S. E. 211; *Legwin v. McRee*, 79 Ga. 430, 4 S. E. 863; *Siddons v. Cockrell*, 131 Ill. 653, 23 N. E. 586; *Hawkins v. Bohling*, 168 Ill. 214, 48 N. E. 94; *Clark v. Shawen*, 190 Ill. 47, 60 N. E. 116; *Kelly v. Gonce*, 49 Ill. App. 82; *Powell v. McDowell*, 194 Ill. 394, 62 N. E. 879; *Knight v. Pottgieser*, 176 Ill. 368, 52 N. E. 934; *Lehnard v. Specht*, 180 Ill. 208, 54 N. E. 315; *Kratz v. Kratz*, 189 Ill. 276, 59 N. E. 519; *Hoover v. Hoover*, 116 Ind. 498, 19 N. E. 468; *Hellman v. Hellman*, 129 Ind. 59, 28 N. E. 310; *Moore v. Hare*, 144 Ind. 573, 48 N. E. 870; *Davidson v. Bates*, 111 Ind. 391, 12 N. E. 687; *HAVILAND v. HAVILAND*, 130 Iowa, 611, 105 N. W. 354, 5 L. R. A. (N. S.) 281, *Dunmore Cas. Wills*, 262; *Bunting v. Speck*, 41 Kan. 424, 21 Pac. 288, 3 L. R. A. 690; *Rudd v. Insurance Co. (Ky. 1903)* 73 S. W. 759; *Gough v. Land Co. (Ky.)* 43 S. W. 405; *Harmon v. Dyer (Ky.)* 12 S. W. 774; *Mercantile Bank of New York v. Ballard's Assignee*, 83 Ky. 481, 4 Am. St. Rep. 160; *Railey v. Milam (Ky.)* 5 S. W. 367; *Woodman v. Woodman*, 89 Me. 128, 35 Atl. 1037; *Straus v. Rost*, 67 Md. 465, 10 Atl. 74; *Brewer v. Cox (Md.)* 18 Atl. 864; *Cherbonnier v. Goodwin*, 79 Md. 55, 28 Atl. 894; *Cox v. Handy*, 78 Md. 108, 27 Atl. 227, 501; *Boyd v. Sachs*, 78 Md. 491, 28 Atl. 391; *Daughters v. Lynch*, 93 Md. 305, 48 Atl. 1055; *Ball v. Holland*, 189 Mass. 369, 75 N. E. 713, 1 L. R. A. (N. S.) 1005; *Dorr v. Lovering*, 147 Mass. 530, 18 N. E. 412; *Swett v. Thompson*, 149 Mass. 302, 21 N. E. 382; *Loring v. Carnes*, 148 Mass. 223, 19 N. E. 343; *Shaw v. Eckley*, 169 Mass. 119, 47 N. E. 609; *Dodd v. Winship*, 144 Mass. 461, 11 N. E. 588; *Curtis v. Fowler*, 66 Mich. 696, 33 N. W. 804; *State v. Willrich*, 72 Minn. 165, 75 N. W. 123; *McDaniel v. Allen*, 64 Miss. 417, 1 South. 356; *Byrne v. France*, 131 Mo. 639, 33 S. W. 178; *Burford v. Aldridge*, 165 Mo. 419, 63 S. W. 109, 65 S. W. 720; *Wiggin v. Perkins*, 64 N. H. 36, 5 Atl. 904; *Snow v. Durgin*, 70 N. H. 121, 47 Atl. 89; *Thyng v. Lane*, 69 N. H. 403, 43 Atl. 616; *Crosby v. Crosby*, 64 N. H. 77, 5 Atl. 907; *Van Glesen v. White*, 53 N. J. Eq. 1, 30 Atl. 331; *Maxwell v. McCreery*, 57 N. J. Eq. 287, 41 Atl. 498; *Cook v. McDowell*, 52 N. J. Eq. 351, 30 Atl. 24; *Howell v. Gifford (N. J. Ch. 1903)* 64 N. J. Eq. 180, 53 Atl. 1074; *Miller v. Worrall*, 59 N. J. Eq. 134, 44 Atl. 890; *Chambers v. Sharp*, 61 N. J.

In such cases this interest goes to his heirs or representatives in event of the remainderman's death before the termination of the particular estate, if the limitation be to him absolutely.⁸⁷ He may assign,⁸⁸ alienate, or mortgage it,⁸⁹ and it is subject to levy and sale,⁹⁰ before the death of the first taker.

So, where an estate is given to one for life, with remainder to another, "if living," the latter takes a vested remainder, subject to be divested on his dying before the termination of the life estate.⁹¹

Vested Remainder in Class—After-Born Members

When a remainder can be construed as to a class, some of whose members are in being at the time of the testator's death, the re-

Eq. 253, 48 Atl. 222; *Adams v. Woolman*, 50 N. J. Eq. 516, 26 Atl. 451; *In re Tienken*, 131 N. Y. 391, 30 N. E. 109; *Surdam v. Cornell*, 116 N. Y. 305, 22 N. E. 450; *In re Young*, 145 N. Y. 535, 40 N. E. 226; *Haug v. Schumacher*, 166 N. Y. 506, 60 N. E. 245; *Miller v. Gilbert*, 144 N. Y. 68, 38 N. E. 979; *Smith v. Allen*, 161 N. Y. 478, 55 N. E. 1056; *Campbell v. Stokes*, 142 N. Y. 23, 36 N. E. 811; *Sage v. Wheeler*, 158 N. Y. 679, 52 N. E. 1126; *In re Tompkins' Estate*, 154 N. Y. 634, 49 N. E. 135; *Hersee v. Simpson*, 154 N. Y. 496, 48 N. E. 890; *Sharp v. Withington*, 154 N. Y. 313, 48 N. E. 537; *Nelson v. Russell*, 135 N. Y. 137, 31 N. E. 1008; *Lewis v. Howe* (1903) 174 N. Y. 340, 66 N. E. 975, 1101; *Bolton v. Bank*, 50 Ohio St. 290, 33 N. E. 1115; *In re Evans' Estate*, 155 Pa. 646, 26 Atl. 739; *Ritter's Appeal*, 190 Pa. 102, 42 Atl. 384; *Appeal of Pennsylvania Co. (Pa.)* 10 Atl. 130; *Yerkes v. Yerkes*, 200 Pa. 419, 50 Atl. 186; *In re Jeremy's Estate*, 178 Pa. 477, 35 Atl. 847; *In re Snyder's Estate*, 180 Pa. 70, 36 Atl. 420; *Hinkson v. Lees*, 181 Pa. 225, 37 Atl. 338; *In re Thomman's Estate*, 161 Pa. 444, 29 Atl. 84; *In re Man's Estate*, 160 Pa. 609, 28 Atl. 939; *In re Barker's Estate*, 159 Pa. 518, 28 Atl. 365, 368; *In re Eckert's Estate*, 157 Pa. 585, 27 Atl. 781; *In re Carstensen's Estate*, 196 Pa. 325, 46 Atl. 495; *Pond v. Allen*, 15 R. I. 171, 2 Atl. 302; *Caswell v. Robinson*, 21 R. I. 193, 42 Atl. 877; *In re Kenyon*, 17 R. I. 149, 20 Atl. 294; *Clarkson v. Pell*, 17 R. I. 646, 24 Atl. 110; *Chafee v. Maker*, 17 R. I. 739, 24 Atl. 773; *Tindal v. Neal*, 59 S. C. 4, 36 S. E. 1004; *Jones v. Knappen*, 63 Vt. 391, 22 Atl. 630, 14 L. R. A. 293; *Stanley v. Stanley's Adm'r*, 92 Va. 534, 24 S. E. 229; *McComb v. McComb*, 96 Va. 779, 32 S. E. 453; *Robison v. Asylum*, 123 U. S. 702, 8 Sup. Ct. 327, 31 L. Ed. 293; *Hickling v. Fair*, 68 Law J. P. C. 12, [1899] App. Cas. 15.

See, however, *Cashman v. Ross*, 155 Wis. 558, 145 N. W. 199.

⁸⁷ *Moulton v. Chapman* (1911) 108 Me. 417, 81 Atl. 1007; *Marsh v. Hoyt*, 161 Mass. 459, 37 N. E. 454; *Lewis v. Howe*, 174 N. Y. 340, 66 N. E. 975, 1101; *Redmond v. Coles* (Tenn. Ch. App.) 52 S. W. 660.

⁸⁸ *Chapman v. Chapman*, 90 Va. 409, 18 S. E. 913.

⁸⁹ *Manhattan Real Estate Ass'n v. Cudlipp*, 80 App. Div. 532, 80 N. Y. Supp. 993; *Perrine v. Newell*, 49 N. J. Eq. 57, 23 Atl. 492.

⁹⁰ *Shipp v. Gibbs*, 88 Ga. 184, 14 S. E. 196.

⁹¹ *McDonald v. Taylor*, 107 Ga. 43, 32 S. E. 879; *Greene v. Huntington*, 73 Conn. 106, 46 Atl. 883; *Harris v. Carpenter*, 109 Ind. 540, 10 N. E. 422; *Butterfield v. Reed*, 160 Mass. 361, 35 N. E. 1128; *Cochrane v. Kip*, 19 App. Div. 272, 46 N. Y. Supp. 148, affirmed in 157 N. Y. 716, 53 N. E. 1124.

Semble: *Kinhead v. Ryan* (N. J. Ch. 1903) 64 N. J. Eq. 454, 53 Atl. 1053; *Forsythe v. Lansing's Ex'rs*, 109 Ky. 518, 59 S. W. 854.

mainder will vest in such members, subject to open and let in subsequently born members of the class.⁹² Thus, where an estate is given to a devisee for life, with remainder to his children, children living at the testator's death have a vested remainder, and, if other children are born after, the estate will open for their benefit;⁹³ and so with a remainder to his heirs,⁹⁴ heirs of his body,⁹⁵ or descendants,⁹⁶ when these words are used as meaning children.

Vested Remainders Devested by Happening of Condition Subsequent

Although the present certainty of the right to enjoy hereafter must exist in every vested remainder, yet this certainty may be defeated by the happening of a condition subsequent. Indeed, the courts manifest a strong tendency to construe remainders as vested and defeasible, rather than contingent upon the happening of the condition. Common instances are where there is a limitation over upon failure of issue in the first taker,⁹⁷ and where the interests of the remaindermen are defeated in event of their dying before the expiration of the particular estate.⁹⁸ Here the remainders are not contingent upon the failure of issue or survivorship, but are

⁹² *Security Co. v. Cone*, 64 Conn. 579, 31 Atl. 7; *Thomas v. Thomas*, 247 Ill. 543, 93 N. E. 344, 139 Am. St. Rep. 347; *Kilgore v. Kilgore*, 127 Ind. 276, 26 N. E. 56; *Middleton's Heirs v. Middleton's Devisees* (Ky.) 43 S. W. 677; *Male v. Williams*, 48 N. J. Eq. 33, 21 Atl. 854; *Clark v. Morehous* (1908) 74 N. J. Eq. 658, 70 Atl. 307; *In re Wetherill's Estate*, 214 Pa. 150, 63 Atl. 406.

⁹³ *Field v. Peeples*, 180 Ill. 376, 54 N. E. 304. Accord: *Dulany v. Middleton*, 72 Md. 67, 19 Atl. 146; *Downes v. Long*, 79 Md. 382, 29 Atl. 827; *Budd v. Haines*, 52 N. J. Eq. 488, 29 Atl. 170; *Losey v. Stanley*, 147 N. Y. 560, 42 N. E. 8, and cases in preceding note.

⁹⁴ *Angus v. Noble*, 73 Conn. 56, 46 Atl. 278; *Smith v. Smith*, 108 Tenn. 21, 64 S. W. 483.

⁹⁵ *Duncan v. De Yampert* (1913) 182 Ala. 528, 62 South. 673; *Winchell v. Winchell*, 259 Ill. 471, 102 N. E. 823.

⁹⁶ *Slote v. Reiss*, 153 Ky. 30, 154 S. W. 405.

⁹⁷ *Allen v. Almy*, 87 Conn. 517, 89 Atl. 205; *Boatman v. Boatman*, 198 Ill. 414, 65 N. E. 81; *Lepps v. Lee* (Ky.) 16 S. W. 346; *Buswell v. Newcomb* (1903) 183 Mass. 111, 66 N. E. 592; *Crawford v. Clark*, 110 Ga. 729, 36 S. E. 404; *Hills v. Barnard*, 152 Mass. 67, 25 N. E. 96, 9 L. R. A. 211; *Lamprey v. Whitehead* (1903) 64 N. J. Eq. 408, 54 Atl. 803; *Havens v. Land Co.*, 47 N. J. Eq. 365, 20 Atl. 497; *United States Trust Co. of New York v. Wheeler* (1903) 173 N. Y. 631, 66 N. E. 1117; *Lewis v. Shropshire* (Ky.) 68 S. W. 426; *Webber v. Jones*, 94 Me. 429, 47 Atl. 903; *Garrison v. Hill*, 79 Md. 75, 28 Atl. 1062, 47 Am. St. Rep. 363; *Wadsworth v. Murray*, 161 N. Y. 274, 55 N. E. 910, 76 Am. St. Rep. 265.

⁹⁸ *Ducker v. Wear & Boogher Dry Goods Co.*, 146 Ill. 9, 34 N. E. 558; *Rudd v. Travelers' Ins. Co.*, 24 Ky. Law Rep. 2141, 73 S. W. 759; *Kinthead v. Ryan*, 64 N. J. Eq. 454, 53 Atl. 1053; *Fox v. Fee*, 24 App. Div. 314, 49 N. Y. Supp. 292; *In re Batlone's Estate*, 136 Pa. 307, 20 Atl. 572; *Chafee v. Maker*, 17 R. I. 739, 24 Atl. 773; *Walker v. Alverson*, 87 S. C. 55, 68 S. E. 966, 30 L. R. A. (N. S.) 115.

vested, defeasible on the first taker's leaving issue or by death. So remainders conditioned on payment of the testator's funeral expenses by the remainderman,⁹⁹ or on his support of the testator's wife, are vested, defeasible on breach of condition.¹ So the intervention of a power of appointment, general or special, whether the estate be real or personal, will not prevent the vesting of a remainder given in default of the exercise of the power, if, apart from the existence of the power, the estate would be vested. In such cases the remainder vests, subject to be divested by the exercise of the power,² as where power to dispose of the property either by sale or by will is given to the life tenant.³

When there are divesting clauses by which a remainder may be defeated, they are to operate so as to vest the estate indefeasibly at the earliest period of time.⁴ Thus, where an estate for life was given, with remainder to the testator's children, the share of any child dying without issue to go to the other children, the share of a son who died before the life tenant, leaving children who survived such tenant, becomes indefeasible at the death of the latter.⁵

The contingency must literally and completely happen in order to divest a vested estate. Thus, where testator devised land to his wife for life, with remainder to be divided between such of his three sons as might survive his wife, and all three sons died before the life tenant, it was held that the estate vested in the sons was not divested, since the contingency of the survivorship by one or more of them of the life tenant had not happened.⁶

Vested Remainder by Implication

A vested remainder may sometimes be raised by implication or necessary inference, as where a life estate is given to the testator's widow, followed by a direction that the estate shall be divided be-

⁹⁹ Phillips v. Wood, 16 R. I. 274, 15 Atl. 88.

¹ Gingrich v. Gingrich, 146 Ind. 227, 45 N. E. 101; Bryant's Adm'r v. Dungan, 92 Ky. 627, 18 S. W. 636, 36 Am. St. Rep. 618.

Semble: In re Loucks' Estate, 203 Pa. 278, 52 Atl. 191.

² Sandford v. Blake, 45 N. J. Eq. 248, 17 Atl. 812; Grosvenor v. Bowen, 15 R. I. 549, 10 Atl. 589; Hawthorn v. Ulrich, 207 Ill. 430, 69 N. E. 885; Kirkpatrick v. Kirkpatrick, 197 Ill. 144, 64 N. E. 267.

³ Thorington v. Thorington, 111 Ala. 237, 20 South. 407, 36 L. R. A. 385; Melton v. Camp, 121 Ga. 693, 49 S. E. 690; Hawkins v. Bohling, 168 Ill. 214, 48 N. E. 94; President, etc., of Harvard College v. Balch, 171 Ill. 275, 49 N. E. 543; Dana v. Dana, 185 Mass. 156, 70 N. E. 49; Woodman v. Woodman, 89 Me. 128, 35 Atl. 1037; Rhodes v. Shaw, 43 N. J. Eq. 430, 11 Atl. 116; Lantz v. Massie's Ex'x, 99 Va. 709, 40 S. E. 50; Hare v. Congregational Soc. of F., 76 Vt. 362, 57 Atl. 964.

⁴ Sumpter v. Carter, 115 Ga. 893, 42 S. E. 324, 60 L. R. A. 274.

⁵ Id.

⁶ Acree v. Dabney, 133 Ala. 437, 32 South. 127.

tween the children after her death,⁷ or where there is a direction to the life tenants to save as much of the property as possible for the children born to them.⁸ So, where the estate was given to trustees for the use of the testator's children in severalty for their lives, with remainder to the children of each at his death, but no provision was made for the death of a beneficiary without children, the remainder after the life estates of the shares of such of the children of the testator as were without issue at the time of his death was held to vest in the heirs of the testator, defeasible on the subsequent birth of children.⁹

Failure of Issue

At common law, where there was a limitation over upon failure of issue, the failure was interpreted as an indefinite failure, which would create in the first taker an estate tail, while the limitation over was valid as a remainder.¹⁰ Wherever modern statutes substantially convert fees tail into fees simple, such limitation over would be invalid as a remainder, and too remote as an executory devise.¹¹ But generally, either by statute or decision, where there is a limitation over by way of remainder upon failure of issue in the first taker, such failure is regarded as a definite failure, occurring during the life of the first taker,¹² and the remaindermen take a vested defeasible interest.¹³

CONTINGENT REMAINDERS

133. A remainder is contingent when it is so limited as to take effect in a person not in being, or not ascertained, or upon an event which may never happen, or may not happen until after the termination of the particular estate.

134. As a general rule, to create a contingent remainder, the intent to that end on the part of the testator must be so clearly indicated as practically to leave no room for construction.

⁷ *Hellman v. Hellman*, 129 Ind. 59, 28 N. E. 310.

⁸ *Peckham v. Lego*, 57 Conn. 553, 19 Atl. 392, 7 L. R. A. 419, 14 Am. St. Rep. 130.

⁹ *Van Nostrand v. Marvin*, 16 App. Div. 28, 44 N. Y. Supp. 679.

Semle: *Peterson v. Jackson*, 196 Ill. 40, 63 N. E. 643.

¹⁰ *Barber v. Pittsburgh, etc., Ry.*, 166 U. S. 83, 17 Sup. Ct. 488, 41 L. Ed. 925; *Brown v. Addison Gilbert Hospital*, 155 Mass. 323, 29 N. E. 625.

¹¹ See post, p. 454.

¹² *Jones v. Moore*, 96 Ky. 273, 28 S. W. 659; *Stone v. Bradlee*, 183 Mass. 165, 66 N. E. 708; *In re Moore's Estate*, 152 N. Y. 602, 46 N. E. 960 (quoting New York statute); *Dunning v. Burden*, 114 N. C. 33, 18 S. E. 969; *Anderson v. United Realty Co.*, 79 Ohio St. 23, 86 N. E. 644, 51 L. R. A. (N. S.) 477.

¹³ See ante, p. 449.

The above definition ¹⁴ is substantially the one always given in this connection, and the hostile attitude of the courts towards remainders of this character has already been sufficiently indicated.¹⁵ The contingency may be due either to uncertainty as to the person who is to take, or, in event of his being ascertained, to uncertainty as to his right to take, which is dependent upon some event other than the termination of the particular estate. When the remainder is limited to those who survive or are living at the termination of this estate, it is regarded, by the decided weight of authority, as contingent, by reason of uncertainty as to the remaindermen, they being regarded as incapable of ascertainment until the expiration of the prior estate;¹⁶ and such is the case when an estate is given to two or more for life, remainder to the survivor.¹⁷ Even where there are no express words of survivorship, there is considerable recognition of the principle that where an estate is to be divided among certain beneficiaries on the termination of the life estate, and there are no other words of gift to the remaindermen, aside from those directing a division, the remainder will be regarded as contingent on their surviving until the termination of the life es-

¹⁴ *Robinson v. Palmer*, 90 Me. 246, 38 Atl. 103.

¹⁵ See ante, p. 443; *Carter v. Carter*, 234 Ill. 507, 85 N. E. 202; *Bunting v. Speck*, 41 Kan. 424, 21 Pac. 288, 3 L. R. A. 690.

¹⁶ *Robertson v. Guenther*, 241 Ill. 511, 89 N. E. 689, 25 L. R. A. (N. S.) 887; *HAWARD v. PEAVEY*, 128 Ill. 430, 21 N. E. 503, 15 Am. St. Rep. 120, *Dunmore Cas. Wills*, 265; *Birdsall v. Birdsall* (1911) 157 Iowa, 363, 132 N. W. 809, 36 L. R. A. (N. S.) 1121; *Loeb v. Struck* (Ky.) 42 S. W. 401; *Weatherford v. Boulware*, 102 Ky. 466, 43 S. W. 729; *Hopkins v. Keazer*, 89 Me. 347, 36 Atl. 615; *Robinson v. Palmer*, 90 Me. 246, 38 Atl. 103; *Spear v. Fogg*, 87 Me. 132, 32 Atl. 791; *Culbreth v. Godwin*, 87 Md. 425, 40 Atl. 268; *Larmour v. Rich*, 71 Md. 369, 18 Atl. 702; *Demill v. Reid*, 71 Md. 175, 17 Atl. 1014; *Mercantile Trust & Deposit Co. v. Brown*, 71 Md. 166, 17 Atl. 937; *Small v. Small*, 90 Md. 550, 45 Atl. 190; *Thomson v. Ludington*, 104 Mass. 193; *Olney v. Hull*, 21 Pick. (Mass.) 311; *Nash v. Nash*, 12 Allen (Mass.) 345; *Dove v. Johnson*, 141 Mass. 287, 5 N. E. 520; *Hills v. Barnard*, 152 Mass. 67, 25 N. E. 96, 9 L. R. A. 211; *Morrill v. Phillips*, 142 Mass. 240, 7 N. E. 771; *Denny v. Kettell*, 135 Mass. 138; *Kuhn v. Webster*, 12 Gray (Mass.) 3; *Holm v. Low*, 4 Metc. (Mass.) 190, 201; *L'Etourneau v. Henquenet*, 89 Mich. 428, 50 N. W. 1077, 28 Am. St. Rep. 310; *Armstrong v. Armstrong*, 54 Minn. 248, 55 N. W. 971; *Hall v. Wiggin*, 67 N. H. 89, 29 Atl. 671; *McGillis v. McGillis*, 154 N. Y. 532, 49 N. E. 145; *Rudd v. Cornell*, 171 N. Y. 114, 63 N. E. 823; *Whitesides v. Cooper*, 115 N. C. 570, 20 S. E. 295; *Appeal of Commonwealth Title Ins. & Trust Co.*, 126 Pa. 223, 17 Atl. 585; *Rhode Island Hospital Trust Co. v. Harris*, 20 R. I. 408, 39 Atl. 750; *In re Melcher* (1903) 24 R. I. 575, 54 Atl. 379; *Tingley v. Harris*, 20 R. I. 517, 40 Atl. 346; *Nicholson v. Cousar*, 50 S. C. 206, 27 S. E. 628; *Roundtree v. Roundtree*, 26 S. C. 450, 2 S. E. 474; *In re Hoadley* (D. C.) 101 Fed. 233.

¹⁷ *Quarm v. Quarm*, [1892] 1 Q. B. 184.

tate.¹⁸ But the cases applying this principle have usually been those in which the direction has required the division among the members of a class and it is sometimes said that the courts hesitate to apply it where the gift is to remaindermen by name.¹⁹

A remainder is also contingent, by reason of uncertainty as to the remaindermen, when an estate is devised to one for life, with remainder to his heirs, where there is nothing to show that the word "heirs" is not used in its technical sense,²⁰ and the same is the case where the remainder is limited to such of the life tenant's "legal representatives as are related to me by blood."²¹ So, where property is devised to sons for life, with remainder to their children, and the sons have no children at the testator's death, the remainder is contingent until it vests in after-born children.²²

A remainder may also be contingent by reason of its dependency upon a certain event, as upon the remainderman's attaining a certain age,²³ or the death of the life tenant without issue, when made expressly contingent upon this event,²⁴ or the failure of a prior con-

¹⁸ This on the ground that, the direction to divide being future, the gift also is future. In *re Crane*, 164 N. Y. 71, 58 N. E. 47; *Clark v. Cammann*, 160 N. Y. 315, 54 N. E. 709.

The principle is concretely recognized in the following cases: *Bates v. Gillett*, 132 Ill. 287, 24 N. E. 611 (devise to testator's daughters for life, "and after the death of either of them, their share to be equally divided among their children," held, that the remainder did not vest until the death of the daughter); *Olsen v. Youngerman* (1907) 136 Iowa, 404, 113 N. W. 938; *Harding v. Harding*, 174 Mass. 268, 54 N. E. 549 (like preceding case); *Hale v. Hobson*, 167 Mass. 397, 45 N. E. 913 (as in preceding case); *Lese v. Miller*, 33 Misc. Rep. 806, 68 N. Y. Supp. 554; *Robinson v. Ostendorff*, 38 S. C. 66, 16 S. E. 371; *In re Albiston's Estate* (1903) 117 Wis. 272, 94 N. W. 169.

¹⁹ *Armstrong v. Barber*, 239 Ill. 389, 88 N. E. 246.

²⁰ *Taylor v. Taylor*, 118 Iowa, 407, 92 N. W. 71; *Jacob v. Howard* (Ky.) 22 S. W. 332; *Preston v. Brant*, 96 Mo. 552, 10 S. W. 78; *Ryan v. Monaghan*, 99 Tenn. 338, 42 S. W. 144; *Cole v. Edwards* (Tenn. Ch. App.) 62 S. W. 641; *Wallace v. Minor*, 86 Va. 550, 10 S. E. 423; *Walcott v. Robinson*, 214 Mass. 172, 100 N. E. 1109; *Wood v. Bullard*, 151 Mass. 324, 25 N. E. 67, 7 L. R. A. 304; *White v. Stanfield*, 146 Mass. 424, 15 N. E. 919; *Lavery v. Egan*, 143 Mass. 389, 9 N. E. 747; *Putnam v. Gleason*, 99 Mass. 454; *Barton v. Bigelow*, 4 Gray (Mass.) 353, 357; *Richardson v. Wheatland*, 7 Metc. (Mass.) 169.

In *Hauser v. Murray* (1914) 256 Mo. 58, 165 S. W. 376, a devise of land to A. for life, with remainder to her "bodily heirs" was held to create only a contingent remainder.

²¹ *Hartford Trust Co. v. Wolcott* (1912) 85 Conn. 134, 81 Atl. 1057.

²² *Hayward v. Spaulding*, 75 N. H. 92, 71 Atl. 219; *Anthracite Sav. Bank v. Lees*, 176 Pa. 402, 35 Atl. 197.

²³ *In re Jobson*, 44 Ch. Div. 154; *Prosser v. Hardesty*, 101 Mo. 593, 14 S. W. 628; *In re Engles' Estate*, 167 Pa. 463, 31 Atl. 681; *Goldtree v. Thompson*, 79 Cal. 613, 22 Pac. 50.

²⁴ *Lee v. O'Donnell*, 95 Md. 538, 52 Atl. 979; *People's Loan & Exchange Bank v. Garlington*, 54 S. C. 413, 32 S. E. 513, 71 Am. St. Rep. 800; *Leppes*

tingent remainder,²⁵ or the abandonment of the land by a prior taker,²⁶ or upon the remainderman continuing to live with the life tenant until the latter's death.²⁷ Where two contingent remainders are limited as substitutes or alternatives, the fact that the contingency on which one is to take effect is too remote does not affect the validity of the other.²⁸

EXECUTORY DEVISES

135. An executory devise is a limitation by will of a future estate or interest in land, which cannot, consistently with the rules of law, take effect as a remainder.

It is not proposed, in this connection, to discuss in detail the law of executory devises, which, although always created by will, are yet governed by principles belonging almost exclusively to the domain of real property law. It is hardly necessary to remind the reader that estates of this character required no prior particular estate for their support;²⁹ that, when accompanied by such prior estate, they need not vest upon its termination,³⁰ or that they could not be defeated by the act of the first taker, and still be executory devises.³¹ One matter may, however, be well enough noted in this connection. One of the most useful purposes served by executory devises was that by them an estate might be limited over a defeasible fee³²—something that could not be effected by a remainder.

v. Lee, 92 Ky. 16, 17 S. W. 146; *In re Reiff's Estate*, 124 Pa. 145, 16 Atl. 636; *Ruddell v. Wren*, 208 Ill. 508, 70 N. E. 751.

²⁵ *Beckley v. Leffingwell*, 57 Conn. 163, 17 Atl. 766; *In re Moore's Estate*, 152 N. Y. 602, 46 N. E. 960; *Hafner v. Hafner*, 171 N. Y. 633, 63 N. E. 1117; *Wilson v. White*, 109 N. Y. 59, 15 N. E. 749, 4 Am. St. Rep. 420.

²⁶ *Hanley v. Coal Co. (C. C.)* 110 Fed. 62.

²⁷ *Adams v. Johnson*, 227 Pa. 454, 76 Atl. 174.

²⁸ *Walker v. Lewis*, 90 Va. 578, 19 S. E. 258.

²⁹ *Dean v. Dean*, [1891] 3 Ch. 150.

Since no livery of seisin was made in passing land by devise, there was obviously not the same necessity for requiring a particular estate to support a future devise as existed when a future estate was created by feoffment.

³⁰ *Blackman v. Fish*, [1892] 3 Ch. 209.

³¹ *Williams v. Elliott*, 246 Ill. 548, 92 N. E. 960, 138 Am. St. Rep. 254; *Fisher v. Wister*, 154 Pa. 65, 25 Atl. 1009.

See, however, 16 Harv. Law Rev. 458, where the policy of this rule is questioned.

³² *Gannon v. Peterson*, 193 Ill. 372, 62 N. E. 210, 55 L. R. A. 701; *Devecmon v. Shaw*, 70 Md. 219, 16 Atl. 645; *Barney v. Arnold*, 15 R. I. 78, 23 Atl. 45; *Rountree v. Rountree*, 85 S. C. 383, 67 S. E. 471; *Randall v. Josselyn*, 59 Vt. 557, 10 Atl. 577.

Such limitations were continually made by testators on the failure of issue of the first taker, and this, at common law, was steadily construed as meaning an indefinite failure, and not a failure during the life of such taker. Hence, when such reference to failure of issue did not result in the giving of an estate tail to the first taker, the limitation over by way of executory devise was void, as offending the rule against perpetuities,³³ and such would also be the case under statutes by which estates tail are converted into fees simple. But slight circumstances were always laid hold of to justify the view that the expression "failure of issue" was used by the testator as referring to a definite failure, i. e., during the life of the first taker;³⁴ and generally, though not always,³⁵ in the United States, it is now the rule, either in consequence of decision or statute, that the phrase means a definite failure of issue in the life of the first taker, or during that of the testator,³⁶ unless there is an express or implied intention to the contrary,³⁷ and the limitation over the prior defeasible fee is valid as an executory devise.³⁸

³³ *Merrill v. American Baptist Missionary Union*, 73 N. H. 414, 62 Atl. 647, 3 L. R. A. (N. S.) 1143, 111 Am. St. Rep. 632, 6 Ann. Cas. 646.

³⁴ *Bedford's Appeal*, 40 Pa. 18.

³⁵ See *Hackney v. Tracy*, 137 Pa. 53, 20 Atl. 560 (where it was held that the expression, following the devise of a fee, "if she die without issue," imports an indefinite failure of issue, which rendered the limitation over void, and carried the fee to the first taker); *In re Hoff's Estate*, 147 Pa. 636, 23 Atl. 890; *Barber v. Railroad Co.*, 166 U. S. 83, 17 Sup. Ct. 488, 41 L. Ed. 925 (applying the law of Pennsylvania). But in this state the testator's intent to limit over upon a definite failure of issue is readily recognized. See *In re Miller's Estate*, 145 Pa. 561, 22 Atl. 1044; *In re Moorhead's Estate*, 180 Pa. 119, 36 Atl. 647; *McCormick v. McElligott*, 127 Pa. 230, 17 Atl. 896, 14 Am. St. Rep. 837.

³⁶ *In re Barrett's Estate*, 85 Neb. 337, 123 N. W. 299, 27 L. R. A. (N. S.) 1047; *Benson v. Corbin*, 145 N. Y. 351, 40 N. E. 11; *Burdge v. Walling*, 45 N. J. Eq. 10, 16 Atl. 51; *Fowler v. Duhme*, 143 Ind. 248, 42 N. E. 623; *Wright v. Charley*, 129 Ind. 257, 28 N. E. 706; *Frank v. Frank* (1908) 120 Tenn. 569, 111 S. W. 1119.

³⁷ *Moore v. Gary*, 149 Ind. 51, 48 N. E. 630.

³⁸ *Crawford v. Clark*, 110 Ga. 729, 36 S. E. 404. See *St. John v. Dann*, 66 Conn. 401, 34 Atl. 110; *Summers v. Smith*, 127 Ill. 645, 21 N. E. 191; *Smith v. Kimbell*, 153 Ill. 368, 38 N. E. 1029; *Field v. Peeples*, 180 Ill. 376, 54 N. E. 304; *Cain v. Robertson*, 27 Ind. App. 198, 61 N. E. 26; *Crozler v. Cundall*, 99 Ky. 202, 35 S. W. 546; *Weybright v. Powell*, 86 Md. 573, 39 Atl. 421; *Mullreed v. Clark*, 110 Mich. 229, 68 N. W. 138, 989; *Naylor v. Godman*, 109 Mo. 543, 19 S. W. 56; *Hitchcock v. Peaslee*, 89 Hun, 506, 35 N. Y. Supp. 423; *In re Peters' Estate*, 69 App. Div. 465, 74 N. Y. Supp. 1028; *Trexler v. Holler*, 107 N. C. 617, 12 S. E. 288; *Wright v. Brown*, 116 N. C. 26, 22 S. E. 313; *Buchanan v. Buchanan*, 99 N. C. 308, 5 S. E. 430; *DE WOLF v. MIDDLETON*, 18 R. I. 810, 26 Atl. 44, 31 Atl. 271, 31 L. R. A. 146, *Dunmore Cas. Wills*, 269; *Bethea v. Bethea*, 48 S. C. 440, 26 S. E. 716; *Ryan v. Monaghan*, 99 Tenn. 338, 42 S. W. 144; *Bruce v. Goodbar*, 104 Tenn. 638, 58 S. W. 282.

A limitation in a will is not construed as an executory devise, when it can take effect as a remainder.³⁹

An executory bequest of personalty, limited upon a definite failure of issue, is valid.⁴⁰

Conditional Limitations

Conditional limitations created in wills are a species of executory devise. Thus, where land was devised to a beneficiary, the possession and use to go to him immediately on the testator's death, to be his absolutely if he survived the testator by ten years, otherwise to go to his issue, the first taker took a fee, with conditional limitation to his issue in event of his death within ten years of the testator's death.⁴¹ And when testator devised a fee to A., but provided that, if she did not live on the land for her life, it should become the absolute property of T., A.'s estate was subject to a conditional limitation, so that, upon her removal from the land, the property vested in T. at once without entry or suit to establish a forfeiture.⁴²

³⁹ *Duncan v. De Yampert*, 182 Ala. 528, 62 South. 673. *Alsman v. Walters* (Ind. App.) 101 N. E. 117.

⁴⁰ *Crawford v. Clark*, 110 Ga. 729, 36 S. E. 404; *Glover v. Condell*, 163 Ill. 566, 45 N. E. 173, 35 L. R. A. 360.

⁴¹ *Whiting v. Whiting*, 42 Minn. 548, 44 N. W. 1030. See, also, *Sutton v. Dickerson*, 85 S. W. 687, 27 Ky. Law Rep. 504.

⁴² *Taylor v. McCowen*, 154 Cal. 798, 99 Pac. 351.

CHAPTER XVIII

CONSTRUCTION (Continued)—CONDITIONS

136-138. Conditions in General.

139. Particular Conditions.

CONDITIONS IN GENERAL

136. A conditional gift is one whose taking effect or whose continued operation depends upon the happening or not happening of some event, either actually uncertain because it is to occur in the future, or subjectively uncertain because of the testator's ignorance of the fact, if it be present or past.
137. A condition precedent is one that must be fulfilled before the estate or interest can vest.
138. A condition subsequent is one whose non-performance or breach will defeat an estate or interest already vested.

No particular form of words need be employed to create a condition.¹ Apt words to that end must be used,² but whenever it clearly appears that it was the testator's intention to make a condition the intention will be effectuated.³ The words "upon condition" are, of course, most appropriate, but even they do not of necessity create such an estate.⁴ As has already been seen, the law favors the vesting of estates, and while the same rigor is perhaps not displayed in construing estates as unconditional, as appears in the construction of vested and contingent gifts,⁵ yet, on an even cast, the tendency undoubtedly is to favor the vested and inde-

¹ 1 Rop. Leg. (3d Ed.) 645; *Wheeler v. Walker*, 2 Conn. 196, 7 Am. Dec. 264; *Hapgood v. Houghton*, 22 Pick. (Mass.) 480; *Fox v. Phelps*, 17 Wend. (N. Y.) 393.

² *Quincy v. Attorney General*, 160 Mass. 431, 35 N. E. 1066; *McElwain v. Society*, 153 Mass. 238, 26 N. E. 692; *Hopkins v. Smith*, 162 Mass. 444, 38 N. E. 1122; *Attorney General v. Merrimack Mfg. Co.*, 14 Gray (Mass.) 586, 612.

³ *Egg v. Devy*, 10 Beav. 444.

⁴ *Episcopal City Mission v. Appleton*, 117 Mass. 326, 329; *Sohler v. Trinity Church*, 109 Mass. 1, 19.

Thus a devise "upon the condition" that the devisee pay testator's widow a certain sum was held merely to charge the land with a lien and not to make the title conditional, there being no devise over and no provision for forfeiture. *Ditchey v. Lee* (1906) 167 Ind. 267, 78 N. E. 972.

⁵ *Bigelow, Wills*, 265.

feasible estate.⁶ Where the testator devised his farm to his wife for life, for a home for herself and children, her life interest was regarded as not conditioned upon the occupancy of the farm as her home.⁷ So a provision that all timber on devised land should be worked in accordance with an existing contract does not attach a condition to the devise in fee, the vesting not being made to depend on performance of the contract, and the will containing nothing to show that the devisee's estate was defeasible in event of nonperformance.⁸ Although the will can have no operative force until the testator's death, yet it may create a condition which must be performed by the beneficiary during the testator's life, as that he shall live with the testator until his death.⁹

Nonperformance of a condition that must be performed in the lifetime of the testator is not excused by the fact that the beneficiary was ignorant of the condition.¹⁰

Conditions Precedent

Although the theoretical distinction between conditions precedent and subsequent is sufficiently obvious, yet, concretely, it is often difficult to determine with certainty whether the condition was to limit the acquisition or the retention of the estate.¹¹ It is always a question of intention, to be determined by the construction of the language of each particular will,¹² and the fact that testator calls the condition which he imposes a "condition precedent" is not conclusive.¹³ "If the language of the particular clause shows that the act on which the estate depends must be performed before the estate can vest, the condition is precedent, and, unless it can be performed, the devisee can take nothing."¹⁴ But where a gift is

⁶ *Ege v. Hering*, 108 Md. 391, 70 Atl. 221 (1908); *Bell v. Nesmith*, 217 Mass. 254, 259, 104 N. E. 721, 723, where court says, "The intention to create a condition precedent which would prevent the vesting of title is not lightly to be inferred, but must clearly appear to have been in the mind of the testator."

⁷ *Talbott v. Hamill*, 151 Mo. 292, 52 S. W. 203.

⁸ *Lambden v. West*, 7 Del. Ch. 266, 44 Atl. 797.

⁹ *Tilley v. King*, 109 N. C. 461, 13 S. E. 936; *Ranken v. Janes*, 1 App. Div. 272, 37 N. Y. Supp. 159.

¹⁰ *Brennan v. Brennan*, 185 Mass. 560, 71 N. E. 80, 102 Am. St. Rep. 363; *Fisher v. Fisher* (1907) 80 Neb. 145, 113 N. W. 1004 (where devise on condition that devisee support testator and devisee ignorant of contents of will); *Johnson v. Warren*, 74 Mich. 491, 42 N. W. 74; *MERRILL v. WISCONSIN FEMALE COLLEGE*, 74 Wis. 415, 43 N. W. 104, *Dunmore Cas. Wills*, 272.

¹¹ *Acherly v. Vernon*, *Willes*, 153.

¹² *De Conick v. De Conick*, 154 Mich. 187, 117 N. W. 570, 22 L. R. A. (N. S.) 417; *Warren' Adm'r v. Bronson*, 81 Vt. 121, 69 Atl. 655.

¹³ *Winn v. Tabernacle Infirmary, etc.* (1910) 135 Ga. 380, 69 S. E. 557, 32 L. R. A. (N. S.) 512.

¹⁴ *Marshall, C. J.*, in *Finlay v. King*, 3 Pet. 346, 375, 7 L. Ed. 701; *Dykeman v. Jenkins*, 179 Ind. 549, 101 N. E. 1013, *Ann. Cas.* 1915D, 1011; *Scott*

couched in language showing an intent to vest title in the beneficiary on the will becoming operative, and attached to the devise are certain conditions, the performance of which may accompany or follow the vesting of title, such conditions are conditions subsequent.¹⁵ No other test to distinguish the two has been suggested, and this test amounts to little more than the remolding and elaboration of the definition, and it is of as little practical use as are most general rules of construction. "The same words may make a condition precedent or subsequent, according to the nature of the thing and the intention."¹⁶ And the construction placed upon conditions in wills may be different from that which the same language would receive if contained in a deed.¹⁷ A legacy to be paid to the beneficiary at a certain time, provided that he be a reformed man,¹⁸ or a devise in fee on the devisee's becoming unmarried,¹⁹ or a bequest to one upon her marriage²⁰ or of a term to one if he lived to the age of twenty-five and paid to another a sum of money,²¹ furnish instances of conditions precedent, and numerous other instances are given hereafter in the discussion of particular conditions.

When the will specifies the time for the performance of the condition precedent, it must be performed at that time, and the fact that the conditional beneficiary was unaware of the existence of the condition until the time for performance had expired affords him no excuse;²² otherwise performance must be had within a reasonable time, this to be determined upon the circumstances of each case.²³

v. Roethlisberger, 178 Mich. 581, 146 N. W. 307; *Reuff v. Coleman*, 30 W. Va. 171, 3 S. E. 597.

¹⁵ *Smith v. Smith*, 64 Neb. 563, 90 N. W. 560.

¹⁶ *Bigelow, Wills*, 268; *Birmingham v. Lesan*, 77 Me. 494, 1 Atl. 151; *MERRILL v. WISCONSIN FEMALE COLLEGE*, 74 Wis. 415, 43 N. W. 104, *Dunmore Cas. Wills*, 272.

¹⁷ *Casey v. Casey*, 55 Vt. 518; *Taft v. Morse*, 4 Metc. (Mass.) 523, 525.

Words which in a deed would create a condition may in a will be construed as a limitation. *Jossey v. Brown*, 119 Ga. 758, 47 S. E. 350.

¹⁸ *Markham v. Hufford*, 123 Mich. 505, 82 N. W. 222, 48 L. R. A. 580, 81 Am. St. Rep. 222.

¹⁹ *Ransdell v. Boston*, 172 Ill. 439, 50 N. E. 111, 43 L. R. A. 526.

²⁰ *McClelland's Ex'r v. McClelland* (1909) 132 Ky. 284, 116 S. W. 730; *Stimpson v. Murch*, 197 Mass. 381, 83 N. E. 1107.

²¹ *Johnson v. Castle*, 8 Vin. Ab. 104, pl. 2. *Semble*: *Stark v. Conde*, 100 Wis. 633, 76 N. W. 600; *Campbell v. Clough*, 71 N. H. 181, 51 Atl. 668.

²² *Powell v. Rawle*, L. R. 18 Eq. 243; *Burgess v. Robinson*, 3 Mer. 7; *In re Hodges' Legacy*, L. R. 16 Eq. 92.

See, also, cases cited in note 10; *supra*.

²³ *Drew v. Wakefield*, 54 Me. 291; *Morath's Ex'r v. Wilber's Adm'r*, 30 Ky. Law Rep. 284, 98 S. W. 321.

The dictum in *Finlay v. King*, 3 Pet. 346, 7 L. Ed. 701, that, in the absence

A condition precedent must be performed in order to permit a devise of land to vest. Hence, if the condition is not fulfilled, regardless of the reason, whether it be illegal and therefore void, or impossible of performance,²⁴ and though there be no default or laches on the part of the devisee, the gift must fail.²⁵ The estate cannot vest when the condition precedent fails of performance for any cause.²⁶ But where a devisee offers to perform a condition precedent, the refusal of others to accept performance cannot defeat a devise to him.²⁷

If personal property is bequeathed upon a condition which before the time of performance becomes impossible, the property vests in the legatee, unless it appears that the performance of the condition was the sole motive for the making of the bequest.²⁸

Although the general rule is that conditions precedent must be strictly performed,²⁹ yet, if there is no limitation over, a performance such as will substantially fulfill the testator's intention is, in equity, sufficient when an adequate reason appears for lack of strict performance.³⁰ Thus where the condition requires a legatee to execute a release within a certain time, if the release is ex-

of any specified time of performance in the will, the party has his lifetime, is probably the case only when such appears to have been the testator's intent, either from the nature of the condition or the construction of the will. 2 Jar. (Big. Ed.) 848, note 2.

²⁴ *Conant v. Stone*, 176 Mich. 654, 143 N. W. 39; *Burleyson v. Whitley*, 97 N. C. 295, 2 S. E. 450, where a devise was made on condition that the beneficiary support testator's mother, who died two hours before the testatrix; *In re Gunning's Estate*, 234 Pa. 139, 83 Atl. 60, 49 L. R. A. (N. S.) 637.

²⁵ *Goff v. Pensenhafer*, 190 Ill. 200, 60 N. E. 110; *Ransdell v. Boston*, 172 Ill. 439, 50 N. E. 111, 43 L. R. A. 526; *Harris v. Harris' Ex'r* (Ky.) 49 S. W. 196; *Robertson v. Mowell*, 66 Md. 565, 10 Atl. 671; *Stark v. Conde*, 100 Wis. 633, 76 N. W. 600.

See, also, *Robinson v. Wheelwright*, 6 De G., M. & G. 535; *Earl of Shrewsbury v. Hope-Scott*, 6 Jur. (N. S.) 452; *Poor v. Meal, Madd. & Geld* 32; *Ridgway v. Woodhouse*, 7 Beav. 437.

²⁶ *Roundel v. Curren*, 2 Br. C. C. 67; *Sprigg v. Sprigg*, 2 Vern. 394; *Brown v. Ferren*, 73 N. H. 6, 58 Atl. 870.

²⁷ *Jacobs v. Ditz*, 260 Ill. 98, 102 N. E. 1077 (where legatees refused to accept legacies the payment of which was made a condition precedent to the vesting of estate in devisee). See, also, *Seeley v. Hincks*, 65 Conn. 1, 31 Atl. 533, and *Harris v. Wright*, 118 N. C. 422, 24 S. E. 751.

²⁸ *Morley v. Calhoun*, 28 Ohio Cir. Ct. R. 163; *Nunnery v. Carter*, 58 N. C. 370, 78 Am. Dec. 231; *Burdis v. Burdis*, 96 Va. 81, 30 S. E. 462, 70 Am. St. Rep. 825.

So, where a legacy is bequeathed subject to a condition precedent, and the performance is made impossible by the act or default of testator, the bequest is absolute. *Frost v. Blackwell* (1913) 82 N. J. Eq. 184, 88 Atl. 176.

²⁹ 2 Wms. Ex'rs, 1267.

³⁰ *Frost v. Blackwell* (1913) 82 N. J. Eq. 184, 88 Atl. 176.

executed within a reasonable, though not within the specified, time, the legatee will take, the period for executing the release being regarded as merely ancillary to the accomplishment of that object.³¹

Conditions Subsequent

Applying the test previously indicated,³² conditions subsequent were held to exist in a devise of a residence for life, the devisees to occupy and not to underlet the same,³³ to a devisee to hold during widowhood,³⁴ in a bequest requiring the legatee to pay an annuity to the testator's wife,³⁵ to one for the purpose of a collegiate education, with limitation over should he fail to carry out this purpose,³⁶ and in a devise to an absent son, with devise over if he failed to return within ten years.³⁷ Numerous other illustrations were noted in the discussion of remainders,³⁸ and others will be given in the course of this chapter.

When no time is fixed for its performance, a condition subsequent must be performed within a reasonable time.³⁹ Where an estate or bequest is made dependent upon the full or continued performance of conditions subsequent, if the conditions are illegal, or void for any cause, or are or become impossible of performance, the effect is not to defeat the estate dependent upon them, but, once vested, that continues, as though no condition had ever attached.⁴⁰ For there obviously can be no breach when performance is impossible or wrongful. Thus where property was devised to a daugh-

³¹ *Id.* 1268; *Taylor v. Popham*, 1 Bro. C. C. 168; *Paine v. Hyde*, 4 Beav. 468; *Wilkins v. Knipe*, 5 Beav. 273; *Burns v. Clark*, 37 Barb. (N. Y.) 496.

³² *Ante*, p. 458.

³³ *In re Hart*, 61 App. Div. 587, 70 N. Y. Supp. 933.

³⁴ *Chenault v. Scott* (Ky.) 66 S. W. 759.

³⁵ *Sherman v. American Congregational Ass'n*, 113 Fed. 609, 51 C. C. A. 329.

³⁶ *Ellicott v. Ellicott*, 90 Md. 321, 45 Atl. 183, 48 L. R. A. 58.

³⁷ *Connor v. Sheridan*, 116 Wis. 666, 93 N. W. 835.

³⁸ *Ante*, p. 449.

³⁹ *Ross v. Tremain*, 2 Metc. (Mass.) 495. See *Carter v. Carter*, 14 Pick. (Mass.) 424; *Tilden v. Tilden*, 13 Gray (Mass.) 103, 109.

⁴⁰ *Pitts v. Campbell* (1911) 173 Ala. 604, 55 South. 500; *Parker v. Parker*, 123 Mass. 584; *Merrill v. Emery*, 10 Pick. (Mass.) 507; *Conrad v. Long*, 33 Mich. 78; *In re Vandevort*, 62 Hun, 612, 17 N. Y. Supp. 316; *Ridgway v. Woodhouse*, 7 Beav. 437; *Burchat v. Woolward*, Turn. & R. 442; *Thomas v. Howell*, 1 Salk. 170; *LYNCH v. MELTON*, 150 N. C. 595, 64 S. E. 497, 27 L. R. A. (N. S.) 684, *Dunmore Cas. Wills*, 274 (where devisee unable to perform condition that she live with the husband of testatrix because the former became insane and was committed to an asylum).

Compare: *Succession of Thompson*, 123 La. 948, 49 South. 651 (where court refused to apply this rule when the performance of the condition which proved impossible appeared to have been the prime cause for the making of the legacy).

ter on condition that she should marry the testator's nephew on or before she attained the age of twenty-one, and, the nephew dying young, the beneficiary, then under age, married another, her estate was held to be unaffected, the performance of the condition having been rendered impossible by the act of God.⁴¹ So where a gift was made payable on the marriage of the beneficiary, provided the marriage received the approval of the testator's widow, otherwise over, and the beneficiary married after the death of her mother, her estate was not defeated, compliance with the condition having become impossible;⁴² and so with a devise conditioned on the devisee's supporting another person, who dies during the testator's lifetime,⁴³ or to pay an annuity to such person.⁴⁴ The same result follows where the condition subsequent is void for uncertainty,⁴⁵ or unreasonableness.⁴⁶ And where a beneficiary is rendered incapable of performing a condition subsequent by insanity,⁴⁷ or the misconduct of another,⁴⁸ and there is no limitation over, he takes the property discharged from the condition.

Inasmuch as the breach of a condition subsequent may work a forfeiture of a vested estate, the very event must happen, or the act, with all its details, must be done, in order to deprive the beneficiary of his gift.⁴⁹ Thus, if legacies be given to two persons, and if either die during the life of A., then to the survivor living at the death of

⁴¹ *Thomas v. Howell*, *supra*.

⁴² *Collett v. Collett*, 35 Beav. 312.

⁴³ *Morse v. Hayden*, 82 Me. 227, 19 Atl. 443; *Parker v. Parker*, 123 Mass. 584; *Hoss v. Hoss*, 140 Ind. 551, 39 N. E. 255.

⁴⁴ *Sherman v. American Congregational Ass'n (C. C.)* 98 Fed. 495.

⁴⁵ *Jeffreys v. Jeffreys*, 84 Law T. 417, where a codicil provided that a life estate created by the will should be forfeited if the beneficiary "shall in any way associate, correspond, or visit with any of my present wife's nephews or nieces."

⁴⁶ *In re Vandevort*, 62 Hun, 612, 17 N. Y. Supp. 316, where a testator, after making certain absolute bequests, by a codicil declared that he was not indebted to any of the legatees, and that, if any legatee should present any claim against the estate, the bequest to such legatee should become "null and void."

⁴⁷ *Bird v. Cross*, 8 Rep. 326.

⁴⁸ *Harrison v. Harrison*, 105 Ga. 517, 31 S. E. 455, 70 Am. St. Rep. 60, where a devise creating a tenancy in common contained a condition subsequent that the land should be used only by devisees remaining on it, and one devisee was compelled to leave by the misconduct of a co-devisee.

⁴⁹ 2 Wms. Ex'rs, 1273.

So where the rents of certain property were given to beneficiaries, conditioned on their residing in the mansion house during a portion of each year, with limitation over in event of the "neglect or refusal" of any of the beneficiaries thus to occupy it, an infant beneficiary, not having power to choose his own place of residence, was held not bound by the condition, if he did not reside in the house the specified time. *Partridge v. Partridge* [1894] 1 Ch. 351. But see *Harrison v. Foote*, 9 Tex. Civ. App. 576, 30 S. W. 838.

A., and both the legatees die before A., the personal representatives of each are entitled, since their vested legacies were defeasible in favor of a survivor who might be living at the death of A., and there was no such survivor.⁵⁰ So a devise in trust for a grandson, to be defeated if any attempt should be made during his minority to withdraw the custody of his person from the trustees, is not defeated by the surrender of the child to his father by the trustees.⁵¹ And a devise of a "double house" for life, with a limitation over if devisee charge, by way of anticipation, "the income arising from the real estate," is not forfeited by the devisee so charging the income from one side of the house.⁵² A breach of condition must be affirmatively shown by those who rely upon it.⁵³

The acceptance of a conditional devise binds the devisee to the performance of the conditions, which he cannot afterwards avoid by disclaiming acceptance.⁵⁴ Thus where property is given in remainder, conditioned upon the payment by the devisee of certain sums to his brothers and sisters, his acceptance of the devise creates an obligation to pay the amounts indicated.⁵⁵ The refusal of one of two joint devisees to accept a conditional gift does not abridge the estate, or curtail the other's time for the performance of the conditions.⁵⁶ So where a bequest is made of the amount necessary to constitute certain persons life members of a society, the intention of the testator being to benefit the society, to which membership therein was merely incidental, the society is entitled to the amount, though some of the persons named decline to accept membership.⁵⁷ Where a further gift is made, conditioned on the acceptance by the beneficiary of a prior conditional gift, the further gift becomes absolute on acceptance, and is not defeated by a breach of the condition of the prior gift.⁵⁸ Where the condition subsequent is for the benefit of a third party, the beneficiary may waive its performance by the person taking the conditional gift, either absolutely,⁵⁹ or by accepting some other benefit in lieu thereof,⁶⁰ whereupon the estate

⁵⁰ *Harrison v. Foreman*, 5 Ves. 207. See *Page v. May*, 24 Beav. 325.

⁵¹ *In re White's Estate*, 163 Pa. 388, 20 Atl. 192.

⁵² *Carlin v. Harris*, 100 Md. 49, 59 Atl. 122.

⁵³ *Garman v. Glass*, 197 Pa. 101, 46 Atl. 923.

⁵⁴ *Bird v. Hawkins*, 58 N. J. Eq. 229, 42 Atl. 588.

⁵⁵ *Fuller v. Fuller*, 84 Me. 475, 24 Atl. 946.

⁵⁶ *Pendleton v. Kinney*, 65 Conn. 222, 32 Atl. 331.

⁵⁷ *Shepard v. Shepard*, 57 Conn. 24, 17 Atl. 173.

⁵⁸ *In re Hart*, 61 App. Div. 587, 70 N. Y. Supp. 933.

⁵⁹ *Alexander v. Alexander*, 156 Mo. 413, 57 S. W. 110.

⁶⁰ *Nevius v. Gourley*, 95 Ill. 206, 214.

Where testator devised land to his sons on condition that they support his daughters in case they came to a state of want, a daughter's acceptance of

is freed from the burden of the condition. So the testator may, by his conduct, waive the performance of a condition, as where a gift is made conditional on the beneficiary's not marrying without the consent of trustees, and she subsequently marries with his consent.⁶¹

PARTICULAR CONDITIONS

139. Chief among these are conditions affecting—

- (a) Marriage and matrimonial relations. Conditions in reasonable and partial restraint of marriage are valid.
- (b) Power of alienation. Where an estate is devised in fee simple, a condition in general restraint of the devisee's power of alienation is void.
- (c) Rights of creditors. Except by the intervention of trustees, property cannot be devised absolutely so as to create in the beneficiary an estate free from liability for his debts.
- (d) Right to contest will. A condition that a gift shall be void in case the beneficiary shall dispute the will is generally regarded as valid.
- (e) Right to present claims against the estate. Gifts conditioned on the beneficiary's not presenting any claim against the estate are valid, particularly if there is a limitation over.
- (f) Death or death without issue. Where there is a limitation over upon the death of the first taker or upon his death without issue, such expressions are construed as referring to a death occurring during the life of the testator.
- (g) Support and maintenance. Gifts conditioned on the beneficiary's rendering support or service to another are valid, the condition being usually construed as a condition subsequent.
- (h) Matters purely personal to the beneficiary.

Conditions Affecting Marriage and Matrimonial Relations

One who has an interest in the future marriage and settlement of the person in life may annex any reasonable condition to the bequest of property to such person, although it may operate to delay or restrict the formation of the marriage relation, and thus, to some extent, operate in restraint of marriage.⁶² Conditions in gen-

a sum of money cannot be said, as a matter of law, to be a waiver of the sons' breach of condition. *Atkins' Ex'x v. Atkins* (1914) 87 Vt. 376, 89 Atl. 643.

⁶¹ *Crommelin v. Crommelin*, 3 Ves. 227.

⁶² 2 Redf. Wills, 290.

For a complete collection of cases relating to restraints on marriage, see note in 4 B. R. C. 64.

eral restraint of marriage, annexed to a gift to one who has never been married, e. g., a gift to a single daughter with limitation over on her marriage,⁶³ are void;⁶⁴ those in partial restraint are valid. Of the latter class are conditions against the devisee's marrying a man below her "in social position,"⁶⁵ or against marriage into a certain family,⁶⁶ or those restraining marriage until a certain age, as twenty-one,⁶⁷ or without the consent of those interested in the devisee's welfare.⁶⁸ It is generally held that where the testator's intention was not to impose a condition in restraint of marriage, but simply, by way of limitation, to indicate when the estate devised should end, a gift to one to hold "so long as she shall remain unmarried"⁶⁹ is valid.

⁶³ *Morley v. Rennoldson*, [1895] 1 Ch. 449, 12 Rep. 158; *Knost v. Knost* (1910) 229 Mo. 170, 129 S. W. 665, 49 L. R. A. (N. S.) 627.

⁶⁴ *In re Alexander's Estate*, 149 Cal. 146, 85 Pac. 308, 9 Ann. Cas. 1141 (decided under Civ. Code, § 710); *Crawford v. Thompson*, 91 Ind. 266, 46 Am. Rep. 598; *Otis v. Prince*, 10 Gray (Mass.) 581; *Bostick v. Blades*, 59 Md. 231, 43 Am. Rep. 548; *Williams v. Cowden*, 13 Mo. 211, 53 Am. Dec. 143; *Maddox v. Maddox's Adm'r*, 11 Grat. (Va.) 804; *Carrodus v. Carrodus*, [1913] Vict. L. R. 1, 4 B. R. C. 1 (declaring such conditions void except where imposed, not from a general objection to marriage, but for some special reason with reference to the legatee).

⁶⁵ *Greene v. Kirkwood*, [1895] 1 Ir. 130.

A condition attached to a devise to sons, terminating their interest if they should marry "common women," was held void for uncertainty in *Watts v. Griffin*, 137 N. C. 572, 50 S. E. 218.

⁶⁶ *PHILLIPS v. FERGUSON*, 85 Va. 509, 8 S. E. 241, 1 L. R. A. 837, 17 Am. St. Rep. 78, *Dunmore Cas. Wills*, 276.

⁶⁷ *Reuff v. Coleman*, 30 W. Va. 171, 3 S. E. 597.

⁶⁸ *In re Nourse*, 68 Law J. Ch. 15, 1 Ch. 63, 79 Law T. (N. S.) 376; *In re Hamilton*, 1 Ont. Law Rep. 10; *Collier v. Slaughter's Adm'r*, 20 Ala. 263; *Collett v. Collett*, 35 Beav. 312.

If such consent is once given by the person designated, it cannot be withdrawn by mere caprice. *In re Brown*, [1904] 1 Ch. 120, 1 B. R. C. 39.

⁶⁹ *Maddox v. Yoe*, 121 Md. 288, 88 Atl. 225, Ann. Cas. 1915B, 1235; *Mann v. Jackson*, 84 Me. 400, 24 Atl. 886, 16 L. R. A. 707, 30 Am. St. Rep. 358; *Ruggles v. Jewett*, 213 Mass. 167, 99 N. E. 1092; *In re Miller's Will*, 159 N. C. 123, 74 S. E. 888; *Summit v. Yount*, 109 Ind. 506, 9 N. E. 582; *In re Bruch's Estate*, 185 Pa. 194, 39 Atl. 813; *In re Brotzman's Estate*, 133 Pa. 478, 19 Atl. 564.

While this doctrine is technically sound, as observing the strict distinction between a condition and a limitation, it yet enables a testator, by a slight variation in language, to defeat that sound public policy which discourages restraint upon marriage. For the practical effect of a gift "so long as" the donee shall remain unmarried cannot well differ from that of a gift "on condition that" she remain unmarried. See *In re Holbrook's Estate*, 213 Pa. 93, 62 Atl. 368, 2 L. R. A. (N. S.) 545, 110 Am. St. Rep. 537, 5 Ann. Cas. 137, for a further criticism of the cases which distinguish in this connection between an estate upon condition and one upon limitation.

The doctrine of the civil law that all conditions in restraint of marriage, whether general or partial, are void,⁷⁰ so far influenced the English ecclesiastical courts in the exercise of their jurisdiction over wills of personalty, and their successors, as to lead to the holding that conditions subsequent, by which legacies may be defeated upon marriage of the legatee without the consent of certain persons, are void, unless there be a limitation over,⁷¹ and the rule has received considerable recognition in the United States.⁷² Such is not the case with a devise.⁷³ Where the consent of several persons is required, that of a majority of them is not sufficient.⁷⁴ Where the consent of executors or trustees is required, that of all those living at the time,⁷⁵ or who have not renounced their office,⁷⁶ must be had.

It is generally recognized that conditions against the remarriage of the testator's widow are valid,⁷⁷ and this whether the property be real or personal, and whether there be an immediate gift over or not,⁷⁸ and the same is true of conditions against the remarriage of a widower.⁷⁹ Such conditions against remarriage may be imposed by any one having a natural interest in the beneficiary, such as a son in the remarriage of his mother,⁸⁰ or of a parent in that of a

⁷⁰ 2 Wms. Ex'rs, 1275.

⁷¹ Stratton v. Grimes, 2 Vern. 357; Wheeler v. Bingham, 3 Atk. 367; Malcolm v. O'Callaghan, 2 Madd. 353; Hogan v. Curtin, 88 N. Y. 162, 42 Am. Rep. 244; Finch's Cases on Law of Property in Land, 546 (containing a full discussion of the English law).

⁷² Hogan v. Curtin, supra; Crawford v. Thompson, 91 Ind. 266, 46 Am. Rep. 598, 4 Am. Prob. Rep. 57, 66; Bostick v. Blades, 59 Md. 231, 43 Am. Rep. 548; Gough v. Manning, 26 Md. 347; Parsons v. Winslow, 6 Mass. 169, 4 Am. Dec. 107.

⁷³ McCullough's Appeal, 12 Pa. 197; Stahl's Appeal, 2 Pa. 801.

⁷⁴ Clark v. Parker, 19 Ves. 1.

⁷⁵ Aislavie v. Evans, 1 Sim. & St. 165.

⁷⁶ Graydon v. Hicks, 2 Atk. 16.

⁷⁷ Bennett v. Packer, 70 Conn. 357, 39 Atl. 739, 66 Am. St. Rep. 112; Rose v. Hale, 185 Ill. 378, 56 N. E. 1073, 76 Am. St. Rep. 40; Siddons v. Cockrell, 131 Ill. 653, 23 N. E. 586; Beshore v. Lytle, 114 Ind. 8, 16 N. E. 490; Levengood v. Hoople, 124 Ind. 27, 24 N. E. 373; Collins v. Burge (Ky.) 47 S. W. 444; Best v. Best, 88 Ky. 569, 11 S. W. 600; Knight v. Mahoney, 152 Mass. 523, 25 N. E. 971, 9 L. R. A. 573; Traphagen v. Levy, 45 N. J. Eq. 448, 18 Atl. 222; Appeal of McGuire (Pa.) 11 Atl. 72; Redding v. Rice, 171 Pa. 301, 33 Atl. 330; Squier v. Harvey, 16 R. I. 226, 14 Atl. 862; Martin v. Seigler, 32 S. C. 267, 10 S. E. 1073; Overton v. Lea, 108 Tenn. 505, 68 S. W. 250; Wooten v. House (Tenn. Ch. App.) 36 S. W. 932; Littler v. Dielmann (1908) 48 Tex. Civ. App. 392, 106 S. W. 1137.

⁷⁸ Chapin v. Cooke, 73 Conn. 72, 46 Atl. 282, 84 Am. St. Rep. 139.

⁷⁹ Stilvers v. Gardner, 88 Iowa, 307, 55 N. W. 516; Bostick v. Blades, 59 Md. 231, 43 Am. Rep. 548.

⁸⁰ Overton v. Lea, 108 Tenn. 505, 68 S. W. 250.

child,⁸¹ and some cases hold valid a condition in restraint of any second marriage, whether of a man or of a woman.⁸²

A bequest providing for the support of a wife pending a present or contemplated separation from her husband has been held valid,⁸³ but not so with one conditioned on her remaining separate and apart from him.⁸⁴ So a bequest of the partial income of an estate, conditioned to be increased to its entire extent in event of the beneficiary's ceasing to be bound to his wife, carries the whole income, the condition being void as tending to encourage divorce.⁸⁵ But where property was left in trust for a married daughter, to become hers absolutely in event of her widowhood, the provision was held valid.⁸⁶ And generally, if testator makes a provision which is not intended to cause a separation or divorce, but is intended to take effect and protect the beneficiary in the case of a legal separation or divorce, the provision is valid.⁸⁷

Conditions Affecting Power of Alienation

Where an estate in fee simple is given by will, a general restraint upon the devisee's power of alienation is void, as repugnant to the nature of the estate conveyed.⁸⁸ So, in the United States, a condi-

⁸¹ *Herd v. Catron*, 97 Tenn. 662, 37 S. W. 551, 37 L. R. A. 731.

⁸² *Allen v. Jackson* (1875) 1 Ch. Div. 399 (holding legacy to a man defeated by his second marriage, although legacy given in will of a relative of the first wife); *Newton v. Marsden*, 2 Johns. & H. 356, 31 L. J. Ch. N. S. 690, 8 Jur. N. S. 1034 (where condition imposed in bequest to the widow of testator's nephew).

⁸³ *Witherspoon v. Brokaw*, 85 Mo. App. 169.

⁸⁴ *Witherspoon v. Brokaw*, *supra*; *Cruger v. Phelps*, 21 Misc. Rep. 252, 47 N. Y. Supp. 61; *Whiton v. Snyder*, 54 Hun, 552, 8 N. Y. Supp. 119.

See *Wren v. Bradley*, 2 De Gex & S. 49; *Brown v. Pick*, 1 Eden, 140; *Conrad v. Long*, 33 Mich. 78.

Contra: *Wright v. Mayer*, 47 App. Div. 604, 62 N. Y. Supp. 610.

⁸⁵ *In re Haight*, 51 App. Div. 310, 64 N. Y. Supp. 1029; *Moore v. Gwynne*, 33 Ohio Cir. Ct. R. 463.

Semle: *Hawke v. Euyart*, 30 Neb. 149, 46 N. W. 422, 27 Am. St. Rep. 391. See, however, *Daboll v. Moon*, 88 Conn. 387, 91 Atl. 646, L. R. A. 1915A, 311.

⁸⁶ *Rittenhouse v. Hicks*, 23 Wkly. Law Bul. (Ohio) 269. Here the wife secured a divorce, and it was held that she should take the property as though her husband had died.

Semle: *Ransdell v. Boston*, 172 Ill. 439, 50 N. E. 111, 43 L. R. A. 526.

⁸⁷ *Coe v. Hill*, 201 Mass. 15, 86 N. E. 949 (where gift sustained although conditioned upon the death of husband of beneficiary or her permanent separation from him); *Dusblber v. Melville* (1914) 178 Mich. 601, 146 N. W. 208, 51 L. R. A. (N. S.) 367; *Snorgrass v. Thomas*, 166 Mo. App. 603, 150 S. W. 106; *Ellis v. Birkhead*, 30 Tex. Civ. App. 529, 71 S. W. 31. See, also, *In re Gunning's Estate*, 234 Pa. 139, 83 Atl. 60, 49 L. R. A. (N. S.) 637.

⁸⁸ See ante, p. 413; *Jones v. Thresher Co.*, 171 Ill. 502, 49 N. E. 700; *Allen v. Craft*, 109 Ind. 476, 9 N. E. 919, 58 Am. Rep. 425; *Fristoe v. Latham* (Ky.) 36 S. W. 920; *Freeman v. Phillips*, 113 Ga. 589, 38 S. E. 943; *McCravey*

tion that the devisee in fee shall alienate only to specified persons,⁸⁹ as to other devisees,⁹⁰ or to his own family,⁹¹ or the heirs of his father,⁹² is generally held to be invalid, though the English rule is apparently otherwise.⁹³ But a condition restricting the power of alienation to a certain class may be valid in case there is a limitation over to a third person on violation of the restricting clause.⁹⁴ In such case, however, the true view is to regard the fee, not as absolute, but as defeasible on attempted alienation to one not a member of the specified class. A condition that the devisee shall not alienate to certain individuals is, however, valid.⁹⁵

Generally, a provision that the devisee in fee shall not alienate during his life⁹⁶ or for a certain period, as for twenty-five years,⁹⁷ or until the youngest child of a certain person should reach his majority,⁹⁸ or while any of the testator's children might become homeless,⁹⁹ is void for repugnancy. But if the language be such as to make the interest a fee defeasible on alienation before a certain period, as that land devised to an infant shall not be sold until he is thirty-five years old, the condition is sometimes held to be valid.¹ The same principles apply to gifts of personal as of real property, in this connection.²

v. Otts, 90 S. C. 447, 74 S. E. 142; ZILLMER v. LANDGUTH, 94 Wis. 607, 69 N. W. 568, Dunmore Cas. Wills, 280.

⁸⁹ Fowlkes v. Wagoner (Tenn. Ch. App.) 46 S. W. 586.

For a more detailed consideration of restraints on alienation qualified as to persons, see Gray, Restraints on Alienation (2d Ed.) §§ 31-44.

⁹⁰ Schermerhorn v. Negus, 1 Denio (N. Y.) 448.

⁹¹ Farris v. Rogers (Ky.) 7 S. W. 543.

⁹² McCullough's Heirs v. Gilmore, 11 Pa. 370, 373.

⁹³ See Doe v. Pearson, 6 East, 173; In re Macleay, L. R. 20 Eq. 186. Both of these cases, however, have been criticized and the English cases are in conflict. See Attwater v. Attwater, 18 Beav. 330, and In re Rosher, 26 Ch. Div. 801, 816.

⁹⁴ Fowlkes v. Wagoner (Tenn. Ch. App.) 46 S. W. 586.

⁹⁵ Overton v. Lea, 108 Tenn. 505, 68 S. W. 250. Contra: Morse v. Blood, 68 Minn. 442, 71 N. W. 682.

⁹⁶ Harkness v. Lisle, 132 Ky. 767, 117 S. W. 264; Wool v. Fleetwood, 136 N. C. 460, 48 S. E. 785, 67 L. R. A. 444.

⁹⁷ Johnson v. Preston, 226 Ill. 447, 80 N. E. 1001, 10 L. R. A. (N. S.) 564; Fowler v. Duhme, 143 Ind. 248, 42 N. E. 623; Ross v. Ayrhart (1908) 138 Iowa, 117, 115 N. W. 906.

⁹⁸ Smith v. Kenny, 89 Ill. App. 203; Roosevelt v. Thurman, 1 Johns. Ch. (N. Y.) 220.

⁹⁹ Reynolds v. Crispin (Pa.) 11 Atl. 236.

¹ See Wallace v. Smith, 113 Ky. 263, 68 S. W. 131.

"The reasoned weight of authority is against the validity of such conditions." Gray, Restraints on Alienation (2d Ed.) § 54, citing many cases.

² In re Wilcox, L. R. 1 Ch. D. 229; Rishton v. Cobb, 3 My. & Cr. 153.

Conditions Affecting Rights of Creditors

Except by the intervention of trustees,³ property cannot be devised absolutely so as to give the beneficiary an estate free from liability for his debts.⁴ But gifts to one until he shall become bankrupt or insolvent, with limitation over, are steadily held to be valid conditional limitations.⁵ And so limitations over upon the taking of the property devised on execution or in any way attempting to subject it to the debts of the beneficiary are sustained.⁶ And a limitation in unmistakable terms that the estate shall cease upon the insolvency of the beneficiary may be valid, even without a limitation over.⁷

Conditions Affecting Right to Contest Will

A condition that a gift shall be void in case the beneficiary shall dispute the will is a condition subsequent.⁸ Generally conditions of this sort are regarded as valid,⁹ particularly when there is a limitation over.¹⁰ But such a condition has been held inoperative where the opposition was made in good faith,¹¹ and a distinction is sometimes attempted between bequests subject to this condition, which

³ *Johnson v. Gooch*, 116 N. C. 64, 21 S. E. 89; *Weller v. Noffsinger*, 57 Neb. 455, 77 N. W. 1075; *First Nat. Bank v. Nashville Trust Co.* (Tenn. Ch. App.) 62 S. W. 392.

Concerning the validity of so-called "spendthrift" trusts, see *Smith v. Towers*, 69 Md. 77, 14 Atl. 497, 15 Atl. 92, 9 Am. St. Rep. 398, and cases there cited.

⁴ *Henderson v. Harness*, 176 Ill. 302, 52 N. E. 68; *Lathrop v. Merrill*, 207 Mass. 6, 92 N. E. 1019; *Van Osdell v. Champlon*, 89 Wis. 661, 62 N. W. 539, 27 L. R. A. 773, 46 Am. St. Rep. 864.

⁵ *Lockyer v. Savage*, 2 Str. 947; *Lear v. Leggett*, 2 Sim. 479; *Townsend v. Early*, 34 Beav. 23; *Lloyd v. Lloyd*, L. R. 2 Eq. 722; *Metcalf v. Metcalfe*, [1891] 3 Ch. 1; *Nichols v. Eaton*, 91 U. S. 716, 727, 23 L. Ed. 254; *Campbell v. Foster*, 35 N. Y. 361; *Leavitt v. Belrne*, 21 Conn. 1.

⁶ *Bottom v. Fultz*, 30 Ky. Law Rep. 479, 98 S. W. 1037; *Brandon v. Robinson*, 18 Ves. Jr. 429; *Bramhall v. Ferris*, 14 N. Y. 41, 67 Am. Dec. 113.

⁷ *Rochford v. Hackman*, 9 Hare, 475, 481. See *In re Maclin*, 21 Ch. Div. 838.

⁸ *Nevitt v. Woodburn*, 190 Ill. 283, 60 N. E. 500.

⁹ *In re Hite's Estate*, 155 Cal. 436, 101 Pac. 443, 21 L. R. A. (N. S.) 953, 17 Ann. Cas. 993; *Moran v. Moran*, 144 Iowa, 451, 123 N. W. 202, 30 L. R. A. (N. S.) 898; *In re Kirkholder's Estate*, 86 Misc. Rep. 692, 149 N. Y. Supp. 87; *Bradford v. Bradford*, 19 Ohio St. 546, 2 Am. Rep. 419; *Thompson v. Gaut*, 14 Lea (Tenn.) 310.

¹⁰ *Smithsonian Institution v. Meech*, 169 U. S. 398, 18 Sup. Ct. 396, 42 L. Ed. 793; *Morrison v. Bowman*, 29 Cal. 337.

¹¹ *Jackson v. Westerfield*, 61 How. Prac. (N. Y.) 399; *In re Friend's Estate*, 209 Pa. 442, 58 Atl. 853, 68 L. R. A. 447; *Chew's Appeal*, 45 Pa. 228; *Rouse v. Branch*, 91 S. C. 111, 74 S. E. 133, 39 L. R. A. (N. S.) 1160, Ann. Cas. 1913E, 1296.

Some jurisdictions hold that even a contest on reasonable grounds works a

have been held void in the absence of a gift over,¹² and devises of realty, whose validity is unaffected by the absence of a limitation over.¹³ Such conditions are not, however, operative as against an infant,¹⁴ unless by the terms of the will the gift to him may be forfeited by the act of other beneficiaries in making a contest.¹⁵ A condition that any devisee who shall contest the will shall pay the expenses of both sides is valid, without limitation over,¹⁶ as is also a condition that the costs of probating the will shall be taken from the share of any devisee who shall attempt to prevent the probate of the will;¹⁷ but a testamentary provision is void which directs that, in case of any litigation growing out of a construction of the will, all costs, counsel fees, and expenses shall be charged against the person commencing legal proceedings.¹⁸

Conditions Affecting Right to Present Claims against the Estate

A condition that a gift is to be void if the beneficiary presents a claim against the estate of the testator is valid,¹⁹ though such a condition has been held to be invalid in the absence of a limitation over.²⁰

Conditions Relating to Death Without Issue

When there is a gift to one person, and in case of his death, or his death without issue, then over, such expressions, when unexplained by the context of the will, are construed as referring to a death occurring during the lifetime of the testator. If the death does not thus occur, the first beneficiary takes an absolute estate; if

forfeiture. *IN RE MILLER'S ESTATE*, 156 Cal. 119, 103 Pac. 842, 23 L. R. A. N. S. 868, Dunmore Cas. Wills, 282; *Moran v. Moran*, supra.

It is submitted that a contest, based upon probable cause, should not be permitted to forfeit a gift because of the policy against affording protection to possible fraud or forgery.

¹² *Donegan v. Wade*, 70 Ala. 501; *In re Wall*, 76 Misc. Rep. 106, 136 N. Y. Supp. 452; *Fifield v. Van Wyck's Ex'r*, 94 Va. 557, 27 S. E. 446, 64 Am. St. Rep. 745; *Powell v. Morgan*, 2 Vern. 90; *Morris v. Burroughs*, 1 Atk. 404.

Some American courts refuse to recognize this distinction. See *Hite's Estate*, supra, and cases there cited.

¹³ *Violett v. Bookman*, 26 Law J. Ch. 308; *Cooke v. Turner*, 15 M. & W. 727.

¹⁴ *Bryant v. Thompson*, 59 Hun, 545, 14 N. Y. Supp. 28.

¹⁵ *Perry v. Rogers* (1908) 52 Tex. Civ. App. 594, 114 S. W. 897.

¹⁶ *Holt v. Holt*, 42 N. J. Eq. 388, 7 Atl. 856, 59 Am. Rep. 43.

¹⁷ *Kayhart v. Whitehead* (1910) 77 N. J. Eq. 12, 76 Atl. 241.

¹⁸ *In re Vom Saal's Will*, 82 Misc. Rep. 531, 145 N. Y. Supp. 307.

¹⁹ *Rockwell v. Swift*, 59 Conn. 289, 20 Atl. 200; *Rogers v. Law*, 66 U. S. (1 Black) 253, 17 L. Ed. 58.

²⁰ *In re Vandevort*, 62 Hun, 612, 17 N. Y. Supp. 316.

But a provision that the legatee shall bring in no bill against the estate, and if she does, the amount thereof is to be deducted from the legacy, seems undoubtedly valid. *Farnham v. Barker*, 148 Mass. 204, 19 N. E. 371.

it does so occur, his heirs or personal representatives take nothing, and the party taking by way of limitation receives an absolute estate.²¹ But the rule does not apply where there are indications in the will, though slight, of a different intention on the part of the testator,²² as where a life estate is given to one, with remainder to another, with limitation over upon the death of the remainderman without issue,²³ or a provision for a reversion of such beneficiary's interest to the estate of the testator.²⁴ In such cases, the time of death is construed as subsequent to that of the testator.

A gift dependent upon the birth of issue is valid, unless too remote,²⁵ and the possibility of issue is regarded as existing regardless of the age of the person of whom they are to be born.²⁶

Conditions Involving Support and Maintenance

Gifts conditioned on the beneficiary's rendering service and support to another are valid, and are ordinarily construed as dependent on a condition subsequent,²⁷ unless the plain intent of the testator is to make the rendering of the support a condition precedent.²⁸ A devise on condition that the devisees care for their mother "provided she resided" with them does not require either of them to provide for her away from his home;²⁹ neither does a devise, conditioned on the beneficiary's caring for and treating the testator's wife as a mother, require him to provide a trained nurse when the wife has funds of her own sufficient to pay for one.³⁰ So a devise of a house, providing that the devisee shall furnish the testator's daughter a home, is construed as intending to secure her reasonable accommodations only in the house, and not support as a mem-

²¹ *Rickards v. Gray*, 6 Houst. (Del.) 232; *Wright v. Charley*, 129 Ind. 257, 28 N. E. 706; *Burdge v. Walling*, 45 N. J. Eq. 10, 16 Atl. 51; *Mead v. Maben*, 131 N. Y. 255, 30 N. E. 98; *In re Robinson's Estate*, 149 Pa. 418, 24 Atl. 297; *Morrison v. Truby*, 145 Pa. 540, 22 Atl. 972; *In re Engel's Estate*, 180 Pa. 215, 36 Atl. 727; *In re Johnson*, 23 R. I. 111, 49 Atl. 695.

²² *In re Maben's Estate* (Sur.) 12 N. Y. Supp. 5, affirmed in *Mead v. Maben*, 131 N. Y. 255, 30 N. E. 98.

²³ *In re Denton*, 137 N. Y. 428, 33 N. E. 482; *Hollister v. Butterworth*, 71 Conn. 57, 40 Atl. 1044.

²⁴ *Trexler v. Holler*, 107 N. C. 617, 12 S. E. 288.

²⁵ *Hatchett v. Trust Co.*, 19 Ky. Law Rep. 174, 39 S. W. 235.

²⁶ *Carney v. Kain*, 40 W. Va. 758, 23 S. E. 650. Contra: *In re Lowman*, [1895] 2 Ch. 348.

²⁷ *Morse v. Hayden*, 82 Me. 227, 19 Atl. 443; *La Chapelle v. Burpee*, 69 Hun, 436, 23 N. Y. Supp. 453.

²⁸ *Irvine v. Irvine* (Ky.) 15 S. W. 511; *Brennan v. Brennan*, 185 Mass. 560, 71 N. E. 80, 102 Am. St. Rep. 363.

²⁹ *Isner v. Kelley*, 51 W. Va. 82, 41 S. E. 158.

³⁰ *In re Wyatt's Estate*, 9 Misc. Rep. 285, 30 N. Y. Supp. 275.

ber of the family, when to hold otherwise would render the gift of little or no value to the beneficiary.⁸¹

Conditions Pertaining to Matters Largely Personal to the Beneficiary

Gifts on condition that the beneficiary shall be baptized with,⁸² or that he shall adopt and assume a certain name, are valid.⁸³ Where the devise was conditioned on the child's being baptized and known by a certain name during his natural life, and it appeared that, while so baptized, he had not been known by the name prior to his becoming of age, there was a sufficient breach to effectuate a limitation over.⁸⁴ Where a bequest is made to a college on condition that its name be changed, a legal change is necessary, and a vote of the trustees that steps be taken to secure such change is not enough.⁸⁵ Since, at common law, a man may change his name without the intervention of the sovereign and without the aid of any legislative act,⁸⁶ an informal assumption by him of the required name is sufficient.⁸⁷

Gifts conditioned on the beneficiary's pursuing certain business,⁸⁸ or following particular lines of study,⁸⁹ or attaining or exhibiting certain traits of character, as that he shall be a reformed man,⁴⁰ or shall be capable of making a prudent use of the gift,⁴¹ or should cease to be a spendthrift for a certain length of time,⁴² or should abstain from the use of tobacco and liquor, and association with

⁸¹ Clough v. Clough, 71 N. H. 412, 52 Atl. 449.

⁸² Smith v. Smith, 64 Neb. 563, 90 N. W. 560 (held a condition subsequent).

⁸³ In re Jackson's Will (Sur.) 20 N. Y. Supp. 380.

⁸⁴ Smith v. Smith, 64 Neb. 563, 90 N. W. 560.

⁸⁵ MERRILL v. WISCONSIN FEMALE COLLEGE, 74 Wis. 415, 43 N. W. 104, Dunmore Cas. Wills, 272.

⁸⁶ See Laffin & Rand Co. v. Steytler, 146 Pa. 434, 442, 23 Atl. 215, 14 L. R. A. 690.

⁸⁷ Lowndes v. Davis, 2 Scott, 71, 74, 1 Bing. N. C. 597.

⁸⁸ Seeley v. Hincks, 65 Conn. 1, 31 Atl. 533; Colby v. Dean, 70 N. H. 591, 49 Atl. 574, holding that, in a bequest on condition that the beneficiaries had some useful trade, the term meant some special occupation or profession, rather than mechanical employment, and that beneficiaries who were book-keepers, typewriters, and teachers complied with the condition; also that in the case of minor beneficiaries the necessary trade could be acquired within a reasonable time after becoming of age.

⁸⁹ Shepard v. Shepard, 57 Conn. 24, 17 Atl. 173.

⁴⁰ Markham v. Hufford, 123 Mich. 505, 82 N. W. 222, 48 L. R. A. 580, 81 Am. St. Rep. 222; Hawke v. Euyart, 30 Neb. 149, 46 N. W. 422, 27 Am. St. Rep. 391.

⁴¹ Rushmore v. Rushmore, 59 Hun, 615, 12 N. Y. Supp. 776.

Compare: Jones v. Jones, 223 Mo. 424, 123 S. W. 29, 25 L. R. A. (N. S.) 424, where such a condition was held invalid for indefiniteness, no person being designated to determine the capacity required by the condition.

⁴² Burnham v. Burnham, 79 Wis. 557, 48 N. W. 661.

immoral persons,⁴³ or that a girl who had lived with the testator should remain in his family and conduct herself as she had heretofore done, until she reached a certain age,⁴⁴ are valid. And so with a gift over to a child in case the father becomes a drunkard and vagabond.⁴⁵ Gifts conditioned on the beneficiary's adhering to⁴⁶ or abstaining from⁴⁷ certain religious beliefs are generally treated as valid, as are also devises on the condition that the devisees shall occupy the property devised.⁴⁸ A condition requiring residence in a certain house is said to be satisfied by such a residence as is necessary to create a legal domicile,⁴⁹ and a temporary absence is not a ground of forfeiture.⁵⁰ Gifts conditioned on the beneficiary's attaining a certain age have already been discussed.⁵¹

Miscellaneous Conditions

Conditions that the devisee should have the land so long as he paid the taxes upon it, with limitation over;⁵² that a portrait should be hung and retained in a certain place;⁵³ that the legatee should bury the testatrix in a certain cemetery;⁵⁴ that the devisee should have an infant under her sole guardianship until arriving at age;⁵⁵ that no intoxicating liquors should be sold upon the premises devised;⁵⁶ that the beneficiary should be in the testator's employ at the time of his decease;⁵⁷ that the money bequeathed should be needed by reason of sickness or misfortune⁵⁸—have been held valid. But a condition in a gift to an adoptive parent, requiring the parent to set aside the adoption of the child, is void.⁵⁹

⁴³ *Onderdonk v. Onderdonk*, 52 Hun, 614, 5 N. Y. Supp. 242.

⁴⁴ *Reuff v. Coleman*, 30 W. Va. 171, 3 S. E. 597, holding that the birth of an illegitimate child prior to the time when the legacy was to be paid defeated the legatee's right to it.

⁴⁵ *Forsyth v. Forsyth*, 46 N. J. Eq. 400, 19 Atl. 119, holding that he must become both, for the limitation to take effect.

⁴⁶ *Magee v. O'Neill*, 19 S. C. 170, 45 Am. Rep. 765. Contra: *Maddox v. Maddox's Adm'r*, 11 Grat. (Va.) 804.

⁴⁷ *Barnum v. Mayor*, 62 Md. 275, 50 Am. Rep. 219, 4 Am. Prob. Rep. 291; *Ex parte Dickson*, 1 Sim. N. S. 37; *Spencer v. See*, 5 Redf. Sur. (N. Y.) 442.

⁴⁸ *Lowe v. Cloud*, 45 Ga. 481; *Marston v. Marston*, 47 Me. 495; *Casper v. Walker*, 33 N. J. Eq. 35; *Harrison v. Foote*, 9 Tex. Civ. App. 576, 30 S. W. 838.

⁴⁹ 2 Jar. Wills, 51, 52.

⁵⁰ *Holt's Ex'r v. Deshon*, 31 Ky. Law Rep. 744, 103 S. W. 281.

⁵¹ See ante, p. 439; *In re Rogers' Estate*, 94 Cal. 526, 29 Pac. 962.

⁵² *Hoselton v. Hoselton*, 166 Mo. 182, 65 S. W. 1005.

⁵³ *In re Gassiot*, 70 Law J. Ch. 242.

⁵⁴ *In re Bratt*, 10 Misc. Rep. 491, 32 N. Y. Supp. 168.

⁵⁵ *Johnson v. Warren*, 74 Mich. 491, 42 N. W. 74.

⁵⁶ *Nudd v. Powers*, 136 Mass. 273.

⁵⁷ *White v. Institute of Technology*, 171 Mass. 84, 97, 50 N. E. 512.

⁵⁸ *Garvey v. Garvey*, 150 Mass. 185, 22 N. E. 889.

⁵⁹ *Anonymous*, 80 Misc. Rep. 10, 141 N. Y. Supp. 700.

CHAPTER XIX

CONSTRUCTION (Continued)—TESTAMENTARY TRUSTS AND POWERS

- 140. Testamentary Trusts—General Rule.
- 141-142. The Trustee.
- 143. The Beneficiary.
- 144. Powers.

TESTAMENTARY TRUSTS—GENERAL RULE

140. Testamentary trusts illustrate the doctrines controlling in the case of trusts generally. The testator must adequately indicate his intention to create a trust by using language sufficient to sever the legal from the equitable estate, and must, with sufficient certainty, identify the beneficiaries, and the property out of which the trust is to take effect.

The above proposition is steadily reiterated in the form that "three things must concur to raise a trust—sufficient words to create it, a definite subject, and a certain or ascertained object."¹ No particular or technical words are required to create a testamentary trust. Though "trust" and "trustee" are apt for this purpose, they are not necessary,² any others showing that the donee was not intended to take beneficially being sufficient.³ Thus gifts to testator's sons and their wives "for the use, benefit, and support of such legatees and their children";⁴ to the wives of certain sons for the education of their children and the support of their families;⁵ to trustees for the benefit of designated children "or their heirs";⁶ to a wife, the property to be administered by her for the support of herself and the testator's children;⁷ to a bishop for the educa-

¹ By Sir William Grant in *Cruwys v. Colman*, 9 Ves. 323.

² *Hughes v. Fitzgerald*, 78 Conn. 4, 60 Atl. 694; *In re Sheets' Estate*, 52 Pa. 266.

The use of the word "trust" is not conclusive on the question whether a trust is created. *Bank of Uklah v. Rice*, 143 Cal. 265, 76 Pac. 1020, 101 Am. St. Rep. 118.

³ *Crockett v. Crockett*, 1 Hare, 451; *Heywood's Estate*, 148 Cal. 184, 82 Pac. 755; *Day v. Roth*, 18 N. Y. 453; *Blackburn v. Blackburn*, 109 N. C. 488, 13 S. E. 937; *Martin v. Moore*, 49 Wash. 288, 94 Pac. 1087.

⁴ *Allen v. McGee*, 158 Ind. 465, 62 N. E. 1002.

⁵ *Clifford v. Stewart*, 95 Me. 38, 49 Atl. 52.

⁶ *O'Rourke v. Beard*, 151 Mass. 9, 23 N. E. 576.

⁷ *O'Riley v. McKiernan*, 90 Ky. 116, 13 S. W. 360; *Anderson v. Crist*, 113 Ind. 65, 15 N. E. 9; *Deans v. Gay*, 132 N. C. 227, 43 S. E. 643.

tion of priests;⁸ to a legatee, to be equally divided between the legatee's children, the legatee to take a child's part;⁹ to a wife, "to have and to use as she may think proper for herself and my children";¹⁰ to a wife, "in good faith believing that she will make a will distributing so much of the property among my near relatives as she may not use for comfortable maintenance, and it is my will that my said wife shall make such distribution";¹¹ to a devisee, with a provision that, in case she sells the property, she shall pay a certain amount to another from the proceeds of the sale;¹² to an executor to invest certain money for the benefit of an indicated beneficiary;¹³ to one for herself and her three children;¹⁴ to a wife, to use so much of the property bequeathed for the support of the testator's niece "as she should, from time to time, in her discretion, think best to do";¹⁵ to one, "he paying the testator's debts"¹⁶—all furnish instances of an adequately indicated intention to create a trust.

The fact that the testator designated the purpose for which a legacy must be used does not necessarily indicate an intention to create a trust.¹⁷ So the mere expression of the motive in making a bequest must be distinguished from such intention,¹⁸ as must also

⁸ *Shanahan v. Kelly*, 88 Minn. 202, 92 N. W. 948 (1903).

⁹ *Freeman v. Brown*, 115 Ga. 23, 41 S. E. 385.

¹⁰ *Elliott v. Elliott*, 117 Ind. 380, 20 N. E. 264, 10 Am. St. Rep. 54.

¹¹ *Cox v. Wills*, 49 N. J. Eq. 130, 22 Atl. 794. *Semble*: *McMurry v. Stanley*, 69 Tex. 227, 6 S. W. 412; *Cresap v. Cresap*, 34 W. Va. 310, 12 S. E. 527; *McClernan v. McClernan*, 73 Md. 283, 20 Atl. 908.

¹² *Haskett v. Alexander*, 134 Ind. 543, 34 N. E. 325.

So a trust is created by a devise to three sons, who are directed to pay to each of testator's daughters a sixth of the value of the estate for life, and on the death of each daughter to pay her heirs such one-sixth. *Comstock v. Redmond*, 252 Ill. 522, 96 N. E. 1073.

¹³ *Dearing v. Selvey*, 50 W. Va. 4, 40 S. E. 478; *Mee v. Gordon*, 187 N. Y. 400, 80 N. E. 353, 116 Am. St. Rep. 613, 10 Ann. Cas. 172.

¹⁴ *Stratton v. McKinnie* (Tenn. Ch. App.) 62 S. W. 636.

¹⁵ *Collister v. Fassitt*, 163 N. Y. 281, 57 N. E. 490, 79 Am. St. Rep. 586.

¹⁶ *Wright v. Wilkin*, 2 Best & S. 32. See *Stanley v. Colt*, 5 Wall. 119, 18 L. Ed. 502; *Sohier v. Trinity Church*, 109 Mass. 1.

¹⁷ *In re Bogart's Will*, 43 App. Div. 582, 60 N. Y. Supp. 498. See *Randall v. Randall*, 135 Ill. 398, 25 N. E. 780, 25 Am. St. Rep. 373.

Where a gift, intended to benefit the donee alone, is expressed to be for a certain purpose, the donee is entitled to it without applying it to the purpose. Thus, where testator directed that annuities be purchased for certain beneficiaries, they were entitled to the money necessary to purchase such annuities, although the will expressly provided that they should not be permitted to accept the money. *Stokes v. Cheek*, 28 Beav. 620, 29 L. J. Ch. 922, 54 Eng. Reprint, 504.

¹⁸ *Elkinton's Ex'r v. Elkinton* (N. J. Ch.) 18 Atl. 587 (where testator bequeathed money "to my daughter-in-law (wife of my son, J.), and to her children by said J., * * * for the support and good of the family, the said

the gift of an estate upon condition,¹⁹ or charged with some burden, such as the support of another.²⁰ Where a will leaves it doubtful whether it was intended to incumber a gift with a trust, or in any way restrict it, the construction most favorable to the beneficiary will be adopted.²¹ Thus the mere expression of a belief that the devisee will do justice with regard to certain persons,²² or of a desire that a certain disposition of the property should be made by the beneficiary,²³ or of an expectation that the testator's wishes would be followed,²⁴ or of certainty that the beneficiary would aid the testator's relatives in case of need,²⁵ or of a suggestion that the property bestowed be used for certain purposes,²⁶ creates no trust. Neither do the words "to be held and enjoyed" by the beneficiary, when used alone and without qualification;²⁷ and a gift to the testator's son, "in trust to my executors," goes to the legatee absolutely, free from any trust.²⁸ So, where a gift is made to a certain society, which is charged under the will to use it for certain purposes, for the accomplishment of which the society was formed, the gift is construed as absolute, and not in trust.²⁹

J. included, the said money not to be held at the disposal of the said J.," held, that the money should be paid to the mother and her children or their guardians, the language expressing the motive for the bequest); *Seamonds v. Hodge*, 36 W. Va. 304, 15 S. E. 156, 32 Am. St. Rep. 854 (where the will gave to testator's wife "all my estate * * * for the purpose of raising her children, to have and to hold unto her and her heirs forever").

¹⁹ *Zimmer v. Sennott*, 134 Ill. 505, 25 N. E. 774 (where the gift was to a wife of "all the rents and profits" of real estate "until the eldest one of my children has attained the age of eighteen years, upon condition that my said wife shall raise and support my children until they respectively have attained the age of eighteen years," held, that the wife took an absolute estate, free from any trust); *Woman's Foreign Missionary Soc. of M. E. Church v. Mitchell*, 93 Md. 199, 48 Atl. 737, 53 L. R. A. 711.

²⁰ *Lang v. Everling*, 3 Misc. Rep. 530, 23 N. Y. Supp. 329. *Semble*: *Griffin v. Griffin* (Ky.) 21 S. W. 38.

²¹ *Fox v. Fox*, 102 Tenn. 77, 50 S. W. 765.

²² *Hill v. Page* (Tenn. Ch. App.) 36 S. W. 735; *Cheston v. Cheston*, 89 Md. 465, 43 Atl. 768.

²³ *In re Martl's Estate*, 132 Cal. 666, 61 Pac. 964, 64 Pac. 1071.

²⁴ *Fairchild v. Edson*, 154 N. Y. 199, 48 N. E. 541, 61 Am. St. Rep. 609.

²⁵ *Toms v. Owen* (C. C.) 52 Fed. 417.

²⁶ *Williams v. Committee*, 92 Md. 407, 48 Atl. 930, 54 L. R. A. 427; *Poor v. Bradbury*, 196 Mass. 207, 81 N. E. 882, 13 Prob. Rep. Ann. 87.

²⁷ *Succession of Justus*, 45 La. Ann. 190, 12 South. 130. *Semble*: *Pell v. Folger*, 68 Hun, 443, 23 N. Y. Supp. 42.

The fact that testatrix gives to beneficiary only "the use" of certain property is not sufficient to indicate an intention to create a trust. *Hardy v. Mayhew* (1910) 158 Cal. 95, 110 Pac. 113, 139 Am. St. Rep. 73; *Little v. Colman*, 74 N. H. 215, 66 Atl. 483.

²⁸ *In re Denfield*, 156 Mass. 265, 30 N. E. 1018.

²⁹ *Pierce v. Phelps*, 75 Conn. 83, 52 Atl. 612; *Doan v. Vestry of Parish of*

Even where the language is sufficient to establish a testamentary trust, if there is uncertainty in the objects to be benefited, or in the subject-matter to be affected, the trust must fail.³⁰ Such a trust must be of so clear and definite a nature that a court can render it effective, in the exercise of its ordinary judicial functions.³¹ Thus a bequest to a bishop to be used for masses for the repose of the souls of the testator and certain others was held void for lack of beneficiaries to enforce it.³² So, where the testator's widow, who was given a life estate in all his property, with a general power of disposition, was requested, at her death, to make equitable disposition of what remained, among the testator's children, the subject-matter was regarded as too indefinite to create a trust capable of being enforced.³³ But a trust otherwise valid will not be permitted to fail because the will does not designate a trustee, since the court has power to appoint one.³⁴ And the fact that no time is stated in the will for the termination of the trust does not render it void as too indefinite.³⁵

Precatory Words as Creating a Trust

The question as to whether precatory words (i. e., words of expectation, hope, desire, or recommendation) can operate to create a trust is, as Professor Bigelow has clearly indicated,³⁶ purely one of definition, and, where the will itself does not determine the sense in which the testator used them, is one for a lexicographer rather than a judge. If such words are used in their primary sense, it is obvious, or should be, that they can impose no obligation upon the first taker.³⁷ If, however, the rest of the will shows that the words are really imperative, and that beneath the veil of courtesy there lurks a positive order—the Latin subjunctive of “mild

Ascension, 103 Md. 662, 64 Atl. 314, 115 Am. St. Rep. 379, 7 L. R. A. (N. S.) 1119; *In re Durand*, 194 N. Y. 477, 87 N. E. 677; *Danforth v. Oshkosh*, 119 Wis. 262, 97 N. W. 258.

³⁰ *Pratt v. Trustees*, 88 Md. 610, 42 Atl. 51. Matters relating to the description of the beneficiary and of the subject-matter of the gift have already been discussed (see ante, pp. 351, 374), and need be referred to but incidentally here.

³¹ *McHugh v. McCole*, 97 Wis. 166, 72 N. W. 631, 40 L. R. A. 724, 65 Am. St. Rep. 106.

³² *Id.*

³³ *Coulson v. Alpaugh*, 163 Ill. 298, 45 N. E. 216. See, also, *Ensley v. Ensley*, 105 Tenn. 107, 58 S. W. 288; *Clark v. Hill*, 98 Tenn. 300, 39 S. W. 339; *Glover v. Baker*, 76 N. H. 393, 83 Atl. 916.

³⁴ *Webber Hospital Ass'n v. McKenzie*, 104 Me. 320, 71 Atl. 1032; *Sears v. Chapman*, 158 Mass. 400, 33 N. E. 604, 35 Am. St. Rep. 502.

³⁵ *Holmes v. Walter*, 118 Wis. 409, 95 N. W. 380, 62 L. R. A. 986, 9 Prob. Rep. Ann. 561.

³⁶ Bigelow, *Wills*, 151, note.

³⁷ See *In re Bellas' Estate*, 176 Pa. 122, 130, 34 Atl. 1003.

command"—then the trust should be effectuated. In the nature of the thing, this is all the so-called "law" that this question can involve. But these obvious facts have been overlooked. The courts have been eager to give unnatural and wrongful meanings to words whose significance is commonly well understood, and the result is a hopeless confusion in the decisions, and that utter absence of principle which inevitably follows the abandonment of right principle. However, it is said that, according to the earlier cases, when property is given absolutely to any person, and the same person is, by the giver, who has power to command, recommended or entreated or wished to dispose of that property in favor of another, the recommendation, entreaty, or wish is held to create a trust, if the words are so used that, upon the whole, they ought to be construed as imperative, and if the subject-matter and the objects of the recommendation be certain.³⁸ The more modern rule, however, is that, in order that a trust may arise from the use of precatory words, the court must be satisfied from the words themselves, taken in connection with all the other terms of the disposition, that the testator's intention to create an express trust was as full, complete, settled, and sure as though he had given the property to hold upon a trust declared in the ordinary manner.³⁹ Applying this rule, it is clear that the same words may have wholly different meanings when read in the light of the context. Thus the expression of a "wish" may⁴⁰ or may not⁴¹ create a trust, and so with "desire,"⁴² "request,"⁴³ and similar

³⁸ Eaton, Equity, 368; Hill v. Page (Tenn. Ch. App.) 36 S. W. 735.

Some modern cases apply this rule of construction. Deacon v. Cobson (1914) 83 N. J. Eq. 122, 89 Atl. 1029.

³⁹ Pom. Eq. Jur. § 1016; Eaton, Equity, 369.

"While in the earlier cases there was a disposition to formulate general rules and to give to a particular word or phrase the same meaning in one will as in another, sometimes even at the risk of defeating the real intention of the testator, the later cases, in trying to ascertain the true meaning of a clause, are inclined to give more consideration to the language of the whole will, and to the particular circumstances of each case." Hammond, J., in McCurdy v. McCallum, 186 Mass. 464, 468, 72 N. E. 75.

⁴⁰ Trustees of Pembroke Academy v. Epsom School Dist., 75 N. H. 408, 75 Atl. 100, 37 L. R. A. (N. S.) 646; PHILLIPS v. PHILLIPS, 112 N. Y. 197, 19 N. E. 411, 8 Am. St. Rep. 737, Dunmore Cas. Wills, 285; Hadley v. Hadley, 100 Tenn. 446, 45 S. W. 342.

⁴¹ Holmes v. Dalley, 192 Mass. 451, 78 N. E. 513 ("wish and desire"); Post v. Moore, 181 N. Y. 15, 73 N. E. 482, 106 Am. St. Rep. 495, 2 Ann. Cas. 591; In re Bellas' Estate, 176 Pa. 122, 130, 34 Atl. 1003.

⁴² Held to create a trust in Foster v. Willson, 68 N. H. 241, 38 Atl. 1003, 73 Am. St. Rep. 581; Wood v. Trust Co., 44 N. J. Eq. 460, 14 Atl. 885. Contra: Jewell v. Barnes' Adm'r, 110 Ky. 329, 61 S. W. 360, 53 L. R. A. 377.

⁴³ Thus the expression of a "request" created a trust in Seefried v. Clarke,

words.⁴⁴ The question in every case is whether they express merely the testator's wish, or whether they express his will.⁴⁵ Where an absolute estate is, in terms, given, precatory words which follow are usually treated as expressions of wish rather than of will.⁴⁶

Trusts not Appearing in the Will

On principle, where the testator makes an absolute devise, his intention, not set forth in the will, that the devisee should hold the property in trust for others, cannot be enforced, though the devisee acknowledge the trust in writing, and define its extent.⁴⁷ However, it is very generally held that, where there is an oral agreement between the testator and the ostensible beneficiary in the will that the latter will hold the gift in trust for others, the constructive trust thereby created will be enforced in equity, despite the statutory requirement that wills be in writing.⁴⁸ "Equity acts in

113 Va. 365, 74 S. E. 204, but was deemed insufficient to create a trust in *White v. Irvine*, 24 Ky. Law Rep. 2458, 74 S. W. 247, and *Carter v. Strickland*, 165 N. C. 69, 80 S. E. 961, Ann. Cas. 1915D, 416.

⁴⁴ The words "will and desire" were held to create a trust in *Deans v. Gay* (1903) 132 N. O. 227, 43 S. E. 643; *Murphy v. Carlin*, 113 Mo. 112, 20 S. W. 786, 35 Am. St. Rep. 699.

The term "recommend" will not ordinarily be interpreted as a command, *In re Whitcomb's Estate*, 86 Cal. 265, 24 Pac. 1028; nor will an expression of confidence that the beneficiary will do a certain thing for another, *Aldrich v. Aldrich*, 172 Mass. 101, 51 N. E. 449.

⁴⁵ *Hughes v. Fitzgerald*, 78 Conn. 4, 60 Atl. 694; *Wood v. Wood*, 32 Ky. Law Rep. 408, 106 S. W. 226; *Taylor v. Martin* (Pa.) 8 Atl. 920. Sometimes the testator may explicitly state the sense in which precatory words are used, as in *Enders' Ex'r v. Tasco*, 89 Ky. 17, 11 S. W. 818; *Eberhardt v. Perolin*, 49 N. J. Eq. 570, 25 Atl. 510; *In re Keleman*, 126 N. Y. 73, 26 N. E. 968.

⁴⁶ *Bryan v. Milby*, 6 Del. Ch. 208, 24 Atl. 333, 13 L. R. A. 563; *Lumpkin v. Rodgers*, 155 Ind. 285, 58 N. E. 72; *Fullenwider v. Watson*, 113 Ind. 18, 14 N. E. 571; *Sale v. Thornberry*, 86 Ky. 266, 5 S. W. 468; *Igo v. Irvine*, 139 Ky. 634, 70 S. W. 836; *Nunn v. O'Brien*, 83 Md. 198, 34 Atl. 244; *Durant v. Smith*, 159 Mass. 229, 34 N. E. 190; *Bacon v. Ransom*, 139 Mass. 117, 29 N. E. 473; *In re Crane's Will*, 159 N. Y. 557, 54 N. E. 1089; *First Presbyterian Church in Village of Waterford v. McKallor*, 35 App. Div. 98, 54 N. Y. Supp. 740; *Street v. Gordon*, 41 App. Div. 439, 58 N. Y. Supp. 860; *In re Whelen's Estate*, 175 Pa. 23, 34 Atl. 329; *In re Hamilton* [1895] 2 Ch. 370, 12 Rep. 355. Contra: *Noe v. Kern*, 93 Mo. 367, 6 S. W. 239, 3 Am. St. Rep. 544. See *Colton v. Colton*, 127 U. S. 300, 8 Sup. Ct. 1164, 32 L. Ed. 138.

⁴⁷ *Moran v. Moran*, 104 Iowa, 216, 73 N. W. 617, 39 L. R. A. 204, 65 Am. St. Rep. 443; *Sims v. Sims*, 94 Va. 580, 27 S. E. 436, 64 Am. St. Rep. 772. See *Keith v. Miller*, 174 Ill. 64, 51 N. E. 151; *In re Schultz's Appeal*, 80 Pa. 396.

⁴⁸ See *Curdy v. Berton*, 79 Cal. 420, 21 Pac. 858, 5 L. R. A. 189, 12 Am. St. Rep. 157; *Trustees of Amherst College v. Ritch*, 151 N. Y. 282, 45 N. E. 876, 37 L. R. A. 305; *BENBROOK v. YANCY*, 96 Miss. 536, 51 South. 461, Dunmore Cas. Wills, 289; *Mead v. Robertson*, 131 Mo. App. 185, 110 S. W. 1095; *Winder v. Scholey*, 83 Ohio St. 204, 93 N. E. 1098, 33 L. R. A. (N. S.) 995, 21 Ann. Cas. 1379; *In re Washington's Estate*, 220 Pa. 204, 69 Atl. 747.

such cases, not because of a trust declared by the testator, but because of the fraud of the legatee."⁴⁹

Implied Trusts

The intention of the donor to create a trust may be often inferred from the powers granted to the trustee, as where a will authorizes the payment of certain annuities by the executors, which would be impossible unless they had a trust estate in the property.⁵⁰ So a will providing that, if certain relatives "shall be at any time * * * in need, I authorize my trustees thereunder to provide" for them, creates an implied trust, and not a discretionary power.⁵¹ So, if the executors of a will are authorized to manage and control certain property, and pay over the net income to beneficiaries, they of necessity take the legal estate, and an express active trust is the result.⁵² And an implied trust arises from a gift of the income only of personalty with remainder over, unless the will expresses a contrary intent.⁵³ While, generally, a trust by implication of law will be decreed wherever it is essential to carry into effect the provisions of the will,⁵⁴ the court will not adopt a strained construction to create such a trust.⁵⁵

Active and Passive Trusts

An active trust is one in which some active duties are imposed upon the trustee with reference to the subject-matter of the trust. Where property is left in trust, the income to be paid to the testator's wife for life, and at her death the fund to be divided among his children, the trust is active; and, though the children have released all their interest therein to the mother, it does not come within the purview of a statute providing for the delivery by a trustee to a beneficiary of property whose profits are bequeathed to the latter for life.⁵⁶ A passive or dry trust is one in which merely the naked legal title is confided to the trustee, and which, in jurisdictions where the statute of uses is in force, will be executed

⁴⁹ *In re O'Hara's Will*, 95 N. Y. 403, 413, 47 Am. Rep. 53.

⁵⁰ *United States Trust Co. v. Maresl*, 33 Misc. Rep. 539, 68 N. Y. Supp. 918.

⁵¹ *Ingraham v. Ingraham*, 169 Ill. 432, 48 N. E. 561, 49 N. E. 320. Accord: *In re Goodrich's Estate*, 38 Wis. 492.

⁵² *Tobias v. Ketchum*, 32 N. Y. 319, 327-331.

⁵³ *Rhines v. Wentworth*, 209 Mass. 585, 95 N. E. 951. See, also, *Ryder v. Lyon*, 85 Conn. 245, 82 Atl. 573.

⁵⁴ *Haywood v. Wachovia Loan & Trust Co.*, 149 N. C. 208, 62 S. E. 915.

⁵⁵ *Hamilton v. Hamilton*, 135 App. Div. 454, 119 N. Y. Supp. 986.

⁵⁶ *Appeal of McClelland*, 130 Pa. 451, 18 Atl. 638; *Appeal of Watson*, 125 Pa. 340, 17 Atl. 426. See, also, *Appeal of Grothe*, 135 Pa. 585, 19 Atl. 1058; *In re Hemphill's Estate*, 180 Pa. 95, 36 Atl. 409.

so as to vest the entire legal and beneficial interest in the beneficiary.⁵⁷

Duration and Termination of Trust

A trust will continue so long as the testator shall indicate,⁵⁸ provided the period does not offend the rule against perpetuities; if no period is indicated, so long as is necessary to accomplish the purpose of the trust.⁵⁹ Where money was bequeathed to a trustee, who was to pay the income to the wife of the testator's son, the principal to be paid to the son if he should for five years lead a temperate life, and the son never reformed, his death was regarded as terminating the trust, when the property passed to his wife and children under the statute of distributions.⁶⁰ Even though the testator has indicated the time of the termination of the trust, it may end sooner if all the purposes of the trust are effected before the time indicated. Thus where a bequest to a grandson was to be held in trust for him for fifteen years after the death of the testator's wife, after which he was to take legal title, since the trust was for his sole benefit, the estate was held to pass to his personal representatives, on his death, free from the trust.⁶¹ The testator may provide that an estate in trust shall become absolute in the beneficiary on her marriage,⁶² or that her interest shall cease on her

⁵⁷ *Mims v. Machlin*, 53 S. C. 6, 30 S. E. 585.

A court of equity may decree the termination of a passive trust which for any reason is not executed by the statute of uses. *Sands v. Old Colony Trust Co.*, 195 Mass. 575, 81 N. E. 300, 12 Ann. Cas. 837.

⁵⁸ *Batt v. Henderson*, 181 Mass. 1, 62 N. E. 954; *Kendall v. Gleason*, 152 Mass. 457, 25 N. E. 838, 9 L. R. A. 509.

⁵⁹ See *Rankine v. Metzger*, 174 N. Y. 540, 66 N. E. 1115 (1903); *Morse v. Morrell*, 82 Me. 80, 19 Atl. 97; *Louisville Trust Co. v. Todd* (Ky.) 22 S. W. 438; *In re Sheaff's Estate*, 231 Pa. 251, 80 Atl. 361.

Where the purpose of the trust in one-half of the trust estate has been accomplished, the trust will not be continued in that one-half. *Wayman v. Follansbee*, 253 Ill. 602, 98 N. E. 21.

⁶⁰ *Weakley v. Buckner*, 91 Ky. 457, 16 S. W. 130. So where money was bequeathed in trust, the income to be paid to testator's wife, and on her decease or marriage the principal to be disposed of between his sons and daughters, but in case the wife should survive such sons and daughters and their issue the principal to be disposed of at her decease in accordance with her will, in default thereof to the testator's heirs, it was held that the trust terminated on the widow's surviving the children, who died without issue, and that she could maintain a bill to terminate the trust. *Whall v. Converse*, 146 Mass. 345, 15 N. E. 660.

For further illustrations, *Lee v. O'Donnell*, 95 Md. 538, 52 Atl. 979; *Taylor v. Richards*, 153 Mich. 667, 117 N. W. 208; *Baker v. McAden*, 118 N. C. 740, 24 S. E. 531.

⁶¹ *Mallory v. Mallory*, 72 Conn. 494, 45 Atl. 164.

⁶² *Hughes v. Rhodes* (Ky.) 37 S. W. 489.

death or marriage, in which case, in event of marriage, the trust fund is to be at once distributed among the testator's heirs.⁶³ A trust may be created for a class, the estate to vest absolutely when the youngest of the class becomes of age,⁶⁴ or it may be terminated by implication on the beneficiary's reaching his majority, as where an estate was given in trust, the trustee to have full power to sell and reinvest the property for the benefit of the beneficiary during his minority.⁶⁵ When the will does not in terms provide for the disposition of the fee in certain trust property, the death of the beneficiaries in a certain order, not contemplated by the will, does not terminate the trust and cause the fee to become a part of the residuary estate, when the construction of all the provisions of the will clearly discloses an intent to pass the fee to persons named, on the death of the beneficiaries, regardless of the order in which they might die.⁶⁶

A trust to several persons or the survivor of them, with remainder over, terminates only on the death of all the first takers.⁶⁷ But if the trust is for specified persons during their respective lives, with remainder over, the remainder takes effect, as to the share of each of the life takers, upon the death of each.⁶⁸ A gift of the income of a trust fund, conditioned to cease in case any proceeding was instituted by creditors for the purpose of reaching such income, terminates upon the beginning of proceedings by a judgment creditor of the beneficiary to subject the income to the payment of his judgment, regardless of the fact that the object of the proceedings was impossible of accomplishment.⁶⁹ Where the will contains no restraint upon the alienation of the trust property, the wish of beneficiaries to have the trust terminated will prevail over an obscure provision in the will which might be construed as indicating a wish to have the estate held in trust and managed for the benefi-

⁶³ *Chapin v. Cooke*, 73 Conn. 72, 46 Atl. 282, 84 Am. St. Rep. 139; *In re Rose's Will*, 156 Wis. 570, 146 N. W. 916.

A trust created for the benefit of a woman "while unmarried," which is terminated by her marriage, is not revived by the subsequent death of her husband. *Thornquist v. Oglethorpe Lodge No. 1*, 140 Ga. 297, 78 S. E. 1086.

⁶⁴ *Mason v. Paschal*, 98 Tenn. 41, 38 S. W. 92; *Otterback v. Bohrer*, 87 Va. 548, 12 S. E. 1013.

⁶⁵ *Page v. Marston*, 94 Me. 342, 47 Atl. 529.

⁶⁶ *Williams v. Jones*, 166 N. Y. 522, 60 N. E. 240, reversing 54 App. Div. 349, 66 N. Y. Supp. 702.

⁶⁷ *Shattuck v. Balcom*, 170 Mass. 245, 49 N. E. 87; *Loring v. Coolidge*, 99 Mass. 191; *Dow v. Doyle*, 103 Mass. 489. See *Clafin v. Dewey*, 177 Mass. 166, 58 N. E. 581; *Seaver v. Griffing*, 176 Mass. 59, 57 N. E. 220; *Hood v. Boardman*, 148 Mass. 330, 19 N. E. 379.

⁶⁸ *Tarrant v. Backus*, 63 Conn. 277, 28 Atl. 46.

⁶⁹ *In re Luscombe's Will*, 109 Wis. 186, 85 N. W. 341.

ciaries;⁷⁰ but there can be no such termination by consent when some of the beneficiaries are infants.⁷¹ And where testator has clearly expressed an intention to create an active trust, a court will not terminate the trust upon extrinsic evidence of testator's reasons for creating it and proof that such reasons no longer exist.⁷²

A trust in which peculiar and personal confidence is placed in the person named as trustee with regard to the exercise of powers conferred upon him terminates, so far as the powers are concerned, at his death.⁷³ In some cases courts can decree the termination of a trust when all the parties interested are capable of acting and assent thereto, although all its purposes may not have been accomplished, as where the residue was to be deposited in a bank, to be appropriated by the executors to the relief of the testator's heirs, should they need assistance,⁷⁴ or where the same person became absolutely entitled to both the principal and income.⁷⁵ If, however, justice requires that the legal and equitable estates be kept distinct, there will be no merger on their uniting in one person.⁷⁶

Resulting Trust

If the trust fail by the death of the beneficiary, the devise being to the trustee for a specific purpose only, he holds the property for the testator's heirs at law, as a resulting trust, and is answerable to them for it.⁷⁷ The same rule applies when the property devised is more than is needed to support the trust,⁷⁸ and where the trust is not sufficiently defined to enable the court to carry it out.⁷⁹

⁷⁰ *Armistead's Ex'rs v. Hartt*, 97 Va. 316, 33 S. E. 616.

⁷¹ *Anderson v. Williams*, 262 Ill. 308, 104 N. E. 659, Ann. Cas. 1915B, 720.

⁷² *CARPENTER v. CARPENTER'S TRUSTEE*, 119 Ky. 582, 84 S. W. 737, 27 Ky. Law Rep. 206, 115 Am. St. Rep. 275, 68 L. R. A. 637, 10 Prob. Rep. Ann. 82, Dunmore Cas. Wills, 290.

⁷³ *Hadley v. Hadley*, 147 Ind. 423, 46 N. E. 823; *Baker v. McAden*, 118 N. C. 740, 24 S. E. 531.

Where the words, "heirs, administrators, and executors," or words of similar import, are added to the designation of a testamentary trustee by name, the will excludes the idea of a personal trust. *Dodge v. Dodge* (1908) 109 Md. 164, 71 Atl. 519, 130 Am. St. Rep. 503.

⁷⁴ *Smith v. Harrington*, 4 Allen (Mass.) 566; *Dodge v. Dodge*, 112 Me. 291, 92 Atl. 49.

⁷⁵ *Inches v. Hill*, 106 Mass. 575; *Peugnet v. Berthold*, 183 Mo. 61, 81 S. W. 874, 9 Prob. Rep. Ann. 256.

⁷⁶ *Earle v. Washburn*, 7 Allen (Mass.) 95, 97.

⁷⁷ *Easterbrooks v. Tillinghast*, 5 Gray (Mass.) 17, 21.

⁷⁸ *Sears v. Hardy*, 120 Mass. 524, 542.

⁷⁹ *Nichols v. Allen*, 130 Mass. 211, 221, 39 Am. Rep. 445; *Olliffe v. Wells*, 130 Mass. 221, 223; *St. Paul's Church v. Attorney General*, 164 Mass. 188, 197, 41 N. E. 231.

THE TRUSTEE

141. Any person, capable of taking and holding the legal estate, and possessed of natural capacity and legal ability to perform the duties imposed by the will, may act as trustee.
142. His duty is to carry out the directions of the will, in so far as they may be legally executed.

These propositions are unquestioned.⁸⁰ Corporations, both public and private, may act as trustees, if the execution of the trust is within the scope of their corporate powers.⁸¹ A bequest of a library to the mayor of a city and the presidents of two medical colleges and their successors, in trust for the purpose of founding a public library, was held to vest the property in the persons who might occupy the positions mentioned, perpetually, and not in the corporations of which they were the heads.⁸² While an infant might legally act as trustee, he should, of course, never be appointed;⁸³ and an alien can take real estate in trust only to the same extent that he can take and hold the legal title for his own use.⁸⁴ If the testator, by his will, has not placed his property in trust with any other trustee than the executor, it is the province and duty of the latter to act as trustee.⁸⁵ There is apparently no objection to a married woman's acting as trustee,⁸⁶ and nonresidence is no disqualification.⁸⁷

Estate Taken by Trustee

When the will does not, in terms, fix the extent of the estate or interest which the trustee is to take in the property, he will take only such an interest as is necessary to enable him to execute the

⁸⁰ Eaton, Equity, 356, 420; Lewin, Trusts, 27.

⁸¹ Attorney General v. Town of Dublin, 38 N. H. 577; Vidal v. Girard's Ex'rs, 2 How. 127, 11 L. Ed. 205; Attorney General v. St. John's Hospital, 2 Dé G., J. & S. 621; Sargent v. Town of Cornish, 54 N. H. 18; Webb v. Neal, 5 Allen (Mass.) 575.

⁸² Cottman v. Grace, 112 N. Y. 299, 19 N. E. 839, 3 L. R. A. 145.

⁸³ Perry, Trusts, §§ 52, 54.

⁸⁴ Id. § 55.

⁸⁵ Dorr v. Wainwright, 13 Pick. (Mass.) 328, 331; White v. Institution of Technology, 171 Mass. 84, 96, 50 N. E. 512; Woods v. Gilson, 178 Mass. 511, 60 N. E. 4, 61 N. E. 58; Bean v. Commonwealth, 186 Mass. 348, 71 N. E. 784.

⁸⁶ Eaton, Equity, 357.

⁸⁷ Roby v. Smith, 131 Ind. 342, 30 N. E. 1093, 31 Am. St. Rep. 439, 15 L. R. A. 792 (holding unconstitutional a statute requiring trustees to be residents of the state).

trust.⁸⁸ This may be a fee,⁸⁹ as where property is devised in trust for the lives of the testator's wife and children, and until the youngest child of any of the testator's children should become of age, when a conveyance was to be made by the trustee to the grandchildren and their heirs;⁹⁰ or a life estate, as when property was devised in trust for the testator's daughters during life, then to become the absolute property of their children;⁹¹ or for years, as where children are entitled to their share in the trust fund on reaching a certain age.⁹² A trustee takes the fee, if the purposes of the trust so require, although no words of inheritance are used in devising to him the legal interest.⁹³

Trustee Cannot Delegate His Powers

A trustee cannot delegate his powers or duties either to a stranger or a co-trustee, unless authorized to do so by the will, or unless morally obliged to do so from necessity, where any reliance is placed upon the judgment or discretion of the trustee.⁹⁴ Hence, where a will directed the executors to invest funds in real estate, and pay the income to a beneficiary for life, and on her death to her children, and the executors, after accepting the trust, conveyed the property to the beneficiary for life under an agreement relieving them from all liability, the conveyance was held void.⁹⁵ But the rule above stated does not prevent the delegation of mere ministerial duties incidental to the execution of the trust.⁹⁶

Compensation of Trustees

In the United States trustees are allowed their reasonable expenses, and are entitled to just and reasonable compensation.⁹⁷ In

⁸⁸ *Doane v. Trust Co.*, 160 N. Y. 494, 55 N. E. 296.

⁸⁹ *Chase v. Cartright*, 53 Ark. 358, 14 S. W. 90, 22 Am. St. Rep. 207; *Doe dem. Patton v. Roe*, 1 Marv. (Del.) 232, 40 Atl. 1106; *Harvey v. Ballard*, 252 Ill. 57, 96 N. E. 558; *Woodward v. James*, 115 N. Y. 346, 22 N. E. 150; *Potter v. Couch*, 141 U. S. 296, 11 Sup. Ct. 1005, 35 L. Ed. 721; *Haynesworth v. Goodwin*, 35 S. C. 54, 14 S. E. 491; *Meek v. Briggs*, 87 Iowa, 610, 54 N. W. 456, 43 Am. St. Rep. 410; *Sneer v. Stutz*, 102 Iowa, 462, 71 N. W. 415.

⁹⁰ *De Haven v. Sherman*, 131 Ill. 115, 22 N. E. 711, 6 L. R. A. 745. *Semble*: *Crane v. Bolles*, 49 N. J. Eq. 373, 24 Atl. 237.

⁹¹ *Brantley v. Porter*, 111 Ga. 886, 36 S. E. 970. See, also, *Hale v. Hale*, 146 Ill. 227, 33 N. E. 858, 20 L. R. A. 247; *Jobe v. Dillard*, 104 Tenn. 658, 58 S. W. 324; *People's Loan & Exchange Bank v. Garlington*, 54 S. C. 413, 32 S. E. 513, 71 Am. St. Rep. 800.

⁹² *Treat v. Vose*, 63 App. Div. 338, 71 N. Y. Supp. 507. See, also, *Weller v. Noffsinger*, 57 Neb. 455, 77 N. W. 1075.

⁹³ *Martin v. Moore*, 49 Wash. 288, 94 Pac. 1087.

⁹⁴ *Eaton, Equity*, 423.

⁹⁵ *Binns v. La Forge*, 191 Ill. 598, 61 N. E. 382.

⁹⁶ *Spengler v. Kuhn*, 212 Ill. 186, 72 N. E. 214.

⁹⁷ *Eaton, Equity*, 433; *Urann v. Coates*, 117 Mass. 41, 44.

some jurisdictions the amount is regulated by statute. The fact that the trustee has received compensation as executor does not deprive him of his right to compensation as trustee, if the duties are separate.⁹⁸ Reasonable counsel fees are allowed,⁹⁹ though where the trustee, who is also a lawyer, charges for services in the latter capacity, the charge is apt to be carefully scrutinized, both as to its reasonableness and the necessity of the service.¹ The testator may provide for the compensation of the trustee, in terms, and an agreement between the trustee and the beneficiary as to the amount is sometimes held valid where the latter is sui juris, and the arrangement is fair and conscionable.²

THE BENEFICIARY

143. As a general rule, whoever is capable of taking and holding the legal title to property under a will may, as beneficiary, receive the equitable title, and, as the legal estate can only be conferred upon a definite taker, the beneficiary must likewise be certain and definite.

The question as to who can take directly under a will has already been discussed at length,³ and as the same doctrines control in the case of equitable beneficiaries they need not be repeated here; and so with regard to the description of the beneficiaries.⁴ A trust without a definite beneficiary who can claim its enforcement is void.⁵ Thus, where a will gives the residue to a brother, in trust "to be disposed of by him as I have heretofore or may hereafter direct him to do," but the beneficiaries are not disclosed either by the will or in any paper that can be regarded as a part of it, the trust failed for uncertainty, a resulting trust arising for the testator's heirs at law;⁶ and so with a devise for the benefit of "near relations."⁷ The bene-

⁹⁸ *Arnold v. Alden*, 173 Ill. 229, 50 N. E. 704.

⁹⁹ *Blake v. Pegram*, 101 Mass. 592, 690; *Willis v. Clymer*, 66 N. J. Eq. 284, 57 Atl. 803 (where trustee acted also as attorney).

¹ *Shirley v. Shattuck*, 28 Miss. 13.

² *Bowker v. Pierce*, 130 Mass. 262.

³ See ante, p. 141.

⁴ See ante, p. 374.

⁵ *Levy v. Levy*, 33 N. Y. 97, 107; *Murray v. Miller*, 178 N. Y. 816, 70 N. E. 870, 9 Prob. Rep. Ann. 501.

⁶ *Heidenheimer v. Bauman*, 84 Tex. 174, 19 S. W. 382, 31 Am. St. Rep. 29; *Condit v. Reynolds*, 66 N. J. Law, 242, 49 Atl. 540. Accord: *Ludlam v. Holman*, 6 Dem. Sur. (N. Y.) 194. See *Gross v. Moore*, 68 Hun, 412, 22 N. Y. Supp. 1019.

⁷ *Sale v. Moore*, 1 Sim. 534.

ficiary need not be described by name; any description by which he may be identified is sufficient.⁸ And the gift of a sum for "the maintenance and support of such of my heirs at law as shall or may be in need of pecuniary assistance" has been held to sufficiently designate the beneficiaries.⁹

The same person may not be both sole trustee and sole beneficiary of the same interest,¹⁰ but the trustee under a testamentary trust may be one of several cestuis que trustent.¹¹

Right of Beneficiaries to Income

Where a fund is given in trust, the income to be paid to a beneficiary, the latter is entitled to it from the testator's death,¹² unless the will provides for the time and amounts of payment.¹³ A gift of the income ordinarily means the net income,¹⁴ and the whole of it,¹⁵ in the absence of an indicated intent to the contrary. Where trustees are directed to apply the net income of a fund "to the support, maintenance, and education" of a child until he becomes of age, when the principal was to be paid to him, the entire income need not be applied to the child's wants, unless necessary for that purpose.¹⁶ And where the will authorizes the trustee to apply so much of the income of a trust fund as may be necessary for the support of a beneficiary, the trustee may make payments, although the beneficiary has an independent estate sufficient for his support.¹⁷

The gift, in trust, of so much of the income of a fund as should be necessary for the support of a son and his children gives the children a several right each to his portion of the income, dependent on the amount necessary for his support, and an arbitrary division

⁸ *Holmes v. Mead*, 52 N. Y. 332, 343.

⁹ *Bronson v. Strouse*, 57 Conn. 147, 17 Atl. 699.

¹⁰ *Weeks v. Frankel*, 197 N. Y. 304, 90 N. E. 969.

¹¹ *In re Vreeland's Estate*, 66 N. J. Eq. 297, 57 Atl. 903; *Burbach v. Burbach*, 217 Ill. 547, 75 N. E. 519.

¹² *McLane v. Cropper*, 5 App. D. C. 276; *Pope v. Pope*, 209 Mass. 432, 95 N. E. 864.

¹³ *Bates v. Barry*, 125 Mass. 83, 28 Am. Rep. 207.

¹⁴ See *Stone v. Littlefield*, 151 Mass. 485, 24 N. E. 592; *Watts v. Howard*, 7 Metc. (Mass.) 478; *Dickinson v. Henderson*, 122 Mich. 583, 81 N. W. 583; *Wolfinger v. Fell*, 195 Pa. 12, 45 Atl. 492; *Goodwin v. McGaughey*, 108 Minn. 248, 122 N. W. 6.

¹⁵ *Gasquet v. Pollock*, 158 N. Y. 734, 53 N. E. 1125.

So, where testator directed that the trustees apply the income of property devised "to the maintenance and use" of his two sons for life, the beneficiaries were held to be entitled to the entire income. *In re Scharmann*, 63 Misc. Rep. 640, 118 N. Y. Supp. 687.

¹⁶ *In re McCormick*, 163 N. Y. 551, 57 N. E. 1116. Semble: *Hooper v. Smith*, 88 Md. 577, 41 Atl. 1095.

¹⁷ *In re Longenecker's Estate*, 226 Pa. 1, 74 Atl. 616.

among the beneficiaries is erroneous.¹⁸ Where property is given in trust for a class, the share of one dying without issue to go to the survivors, and the income of such members of the class as should become intemperate or incompetent to manage their interest to be withheld, the portion thus withheld goes to the other members of the class.¹⁹

Miscellaneous

In the absence of a restriction to the contrary, the holder of the beneficial interest in a trust may devise,²⁰ or convey it.²¹ Where the parties entitled under a will to the whole beneficial interest in an estate all join in an election to receive it as land rather than as money, in the absence of any superior equity, the trustee holding the lands solely for the purpose of division will be directed to convey land to the beneficiaries, according to their interest under the will.²²

POWERS

144. A power is an authority to create some estate in land, independent of any estate therein possessed by the donee of the power, or to impose a charge thereon, or to revoke an existing estate therein. Powers of appointment may be general, i. e., exercisable in favor of anybody, or special, i. e., exercisable only in favor of particular persons or classes. Powers may be created by will by any language clearly indicating the testator's intent to that end.

A power is, briefly, a right to create or change an estate in land.²³ It is distinguishable from an estate as being a mere right over, and not an interest in, the land.²⁴ The power may be, and frequently is, coupled with an interest in the land, as in case of a gift to a life tenant, with a general power of disposition, or it may be merely a naked power, disassociated with any estate, as where executors are authorized to sell any or all of the testator's real estate and make a certain disposition of the proceeds.²⁵

¹⁸ *Woodruff v. Woodruff*, 54 App. Div. 414, 66 N. Y. Supp. 936.

¹⁹ *Lombard v. Witbeck*, 173 Ill. 396, 51 N. E. 61.

²⁰ *Bransfield v. Wigmore*, 80 Conn. 11, 66 Atl. 778; *Chase v. Benedict*, 72 Conn. 322, 44 Atl. 507.

²¹ *Kean's Guardian v. Kean* (Ky.) 18 S. W. 1032.

²² *Beldman v. Sparks*, 61 N. J. Eq. 226, 47 Atl. 811.

²³ *Burleigh v. Clough*, 52 N. H. 267, 13 Am. Rep. 23; *Rodgers v. Wallace*, 50 N. C. 181.

²⁴ *Sewall v. Wilmer*, 132 Mass. 131; *Eaton v. Straw*, 18 N. H. 820.

²⁵ *Bradt v. Hodgdon*, 94 Me. 559, 48 Atl. 179.

No technical language need be used in the creation of a power. Any words definite enough to disclose its nature, the donee, or the person by whom it is to be exercised, and its objects, are enough. A will expressing the wish that the remainder of the estate be disposed of in accordance with the judgment and advice of the executor gives the latter an unlimited power of disposition.²⁶ The powers most commonly conferred by wills, either expressly or by necessary implication, are powers to sell and powers to devise property.

Powers of Sale

A power of sale may be conferred by will either in express terms or by implication, as where the will contains a provision that persons named should take certain shares of "the net proceeds of the sale" of the testator's realty, though no person is designated to make the sale,²⁷ or where lands are given to a wife for life, with a devise over to others of "whatever may remain."²⁸ A power to sell is not generally regarded as including a power to mortgage.²⁹ But where an absolute and unrestricted power of sale is given in furtherance of some benefit which is conferred upon the donee, language creating the power is construed as giving the power to mortgage when such a construction promotes the purpose of the testator.³⁰

So a power authorizing the testator's wife, who was given a life estate, to sell and dispose of the estate as she may deem best to support herself and family, and carry on the testator's business, includes a power to mortgage the estate for these purposes.³¹ Where land is devised, with a power of sale in the devisee "if a sale is ad-

²⁶ *In re Watts' Estate*, 202 Pa. 85, 51 Atl. 588.

²⁷ *Meehan v. Brennan*, 16 App. Div. 395, 45 N. Y. Supp. 57. Accord: *Corley v. Bishop*, 101 Miss. 490, 58 South. 360.

²⁸ *YOUNG v. HILLIER* (1907) 103 Me. 17, 67 Atl. 571, 125 Am. St. Rep. 283, *Dunmore Cas. Wills*, 293, citing with approval *Johnson v. Battelle*, 125 Mass. 453. For further illustrations of implied power of sale, see *Wenger v. Thompson* (1905) 128 Iowa, 750, 105 N. W. 333; *Stein v. Stein*, 79 Md. 464, 29 Atl. 691; *Iasigi v. Iasigi*, 161 Mass. 75, 36 N. E. 579; *Tomkins v. Miller* (N. J.) 27 Atl. 484; *Pennsylvania Co. for Insurance on Lives v. Leggate*, 166 Pa. 147, 30 Atl. 946.

²⁹ 2 Wash. Real Prop. 318; *Hoyt v. Jaques*, 129 Mass. 286; *Dewein v. Hooss*, 237 Mo. 23, 139 S. W. 195 (1911); *Bloomer v. Waldron*, 3 Hill (N. Y.) 361; *Ferry v. Laible*, 31 N. J. Eq. 566. Contra: *Zane v. Kennedy*, 73 Pa. 182.

³⁰ *Hamilton v. Hamilton* (1910) 149 Iowa, 321, 128 N. W. 380; *Kent v. Morrison*, 153 Mass. 137, 26 N. E. 427, 25 Am. St. Rep. 616, 10 L. R. A. 756; *Grace v. Perry* (1905) 197 Mo. 550, 95 S. W. 875, 7 Ann. Cas. 948. See, also, *Lueft v. Lueft*, 129 Wis. 534, 109 N. W. 652, 7 L. R. A. (N. S.) 263, 9 Ann. Cas. 819.

³¹ *Lardner v. Williams*, 98 Wis. 514, 74 N. W. 346.

vantageous," the devisee's decision that a sale is advisable is conclusive.⁸²

Who may Execute a Power of Sale

An infant may execute a power which is collateral or in gross, whether as to real or personal property.⁸³ A married woman, even before the removal of her common-law disabilities, could execute a power of sale, or any power relating to real estate, without the consent of her husband, and this was the usual method of conferring upon her the right to deal with her separate estate.⁸⁴

Where a power of sale is created but no donee is in terms indicated, it will not fail for lack thereof, particularly if it be a power given in trust. A power to sell is readily implied as existing in the executors, as when the proceeds of a sale are to be received and distributed by them.⁸⁵ If the power of sale is expressly given to executors or trustees, as such, in their official capacity, and *virtute officii*, or to them as joint tenants, or to the survivor or survivors of them it can be exercised so long as there is a single executor or trustee remaining.⁸⁶ In case of the death of all the original executors or trustees, leaving the power unexecuted, if the will imposes upon them the duty of selling real estate absolutely, unconditionally, and without discretion, the power follows the office,⁸⁷ and will exist in their successors; and where direction to sell is peremptory, the power may be executed by an administrator with will annexed when the person nominated as executor refuses to qualify.⁸⁸ If, however, the power of the executor to sell is not coupled with an interest, and the direction to sell is not peremptory, but rests in the discretion of the executor, the power is personal, and does not follow the office.⁸⁹ If the power of sale is

⁸² *Johnson v. Dumeyer* (Ky.) 66 S. W. 1025. See, also, *In re Rogers' Estate*, 185 Pa. 428, 39 Atl. 1109; *Matthews v. Capshaw*, 109 Tenn. 480, 72 S. W. 964, 97 Am. St. Rep. 854 (where donee held sole judge as to necessity of selling).

⁸³ *In re D'Angibaw*, 15 Ch. D. 228, 49 L. J. Ch. 756; *Sheldon v. Newton*, 3 Ohio St. 494.

⁸⁴ *Rush v. Lewis*, 21 Pa. 72; *Ladd v. Ladd*, 8 How. 10, 12 L. Ed. 967.

⁸⁵ *Ogle v. Reynolds*, 75 Md. 150, 23 Atl. 137. See, also, *Walling v. Scott*, 50 Ind. App. 23, 96 N. E. 481, 97 N. E. 388; *Mandlebaum v. McDonell*, 29 Mich. 78, 18 Am. Rep. 61; *Silverthorn v. McKinster*, 12 Pa. 67.

⁸⁶ *Bradford v. Monks*, 132 Mass. 405; *Nugent v. Cloon*, 117 Mass. 219; *Gould v. Mather*, 104 Mass. 283; *Gibbs v. Marsh*, 2 Metc. (Mass.) 243; *Denton v. Clark*, 36 N. J. Eq. 534; *Jennings v. Teague*, 14 S. C. 229.

⁸⁷ *Farrar v. McCue*, 89 N. Y. 139, 144; *Clark v. Denton*, 36 N. J. Eq. 419, 423; *Potts v. Breneman*, 182 Pa. 295, 37 Atl. 1002.

⁸⁸ *Leonard v. Hale's Adm'r*, 144 Ky. 77, 137 S. W. 866 (where power originally given to "H., heretofore appointed my executor under my will.")

⁸⁹ 2 Woerner, *Am. Law of Administration*, 719; *Hodgin v. Toler*, 70 Iowa,

vested in several donees, who are required to exercise discretion, all must join in its execution,⁴⁰ unless otherwise provided. And where the power is given to several persons having a trust capacity, or an office in its nature like that of the executors of a will, the donees being designated by name, the trust is regarded as reposed in the donees as individuals, and the power will not survive unless they take an interest coupled with the power.⁴¹

Where a sale is authorized upon the consent of specified persons, the consent of all must be obtained to the valid exercise of the power.⁴² The death before consent given of the person, or of one of several persons, whose consent is required to the execution of the power, prevents its execution, unless the donor or the statute provides otherwise.⁴³

How a Power Should be Executed

The donee of every testamentary power, including a power of sale, must execute it strictly in the method indicated by the testator and an intention to execute the power must appear in its execution either by express terms or recitals or by necessary implication.⁴⁴ Questions in this connection most frequently arise from the wills of life tenants, whose estates for life are coupled with a power to dispose of the property by will, more particularly as to whether the power has been exercised under a general or residuary clause. If the whole will discloses with reasonable clearness an intent to exercise a power of appointment of which the testator was the donee, such a clause will be sufficient, though it con-

21, 30 N. W. 1, 59 Am. Rep. 435; *Bennett v. Chapin*, 77 Mich. 526, 48 N. W. 893, 7 L. R. A. 377; *Clark v. Hornthal*, 47 Miss. 434, 474; *Stoutenburgh v. Moore*, 37 N. J. Eq. 63; *McDonald v. King*, 1 N. J. Law, 432; *Cooke v. Platt*, 98 N. Y. 35; *Frisby v. Withers*, 61 Tex. 134.

⁴⁰ *Pennsylvania Company for Ins. on Lives v. Bauerle*, 143 Ill. 459, 38 N. E. 166; *Tarlton v. Gilsey* (N. J. Ch.) 37 Atl. 467; *Shelton v. Homer*, 5 Metc. (Mass.) 462.

⁴¹ *Burdick on Real Property*, 735; *Peter v. Beverly*, 10 Pet. 532, 563, 9 L. Ed. 522; *Franklin v. Osgood*, 14 Johns. (N. Y.) 527; *Tainter v. Clark*, 13 Metc. (Mass.) 220; *Parrott v. Edmondson*, 64 Ga. 332; *Gutman v. Buckler*, 69 Md. 7, 13 Atl. 635.

⁴² *Poole v. Anderson*, 80 Md. 454, 31 Atl. 207.

⁴³ *Peirsol v. Roop*, 56 N. J. Eq. 739, 40 Atl. 124; *Gulick v. Griswold*, 160 N. Y. 399, 54 N. E. 780; *Barber v. Cary*, 11 N. Y. 397. See, however, *Hackett v. Milnor*, 156 Pa. 1, 26 Atl. 738.

⁴⁴ *Scott v. Bryan*, 194 Pa. 41, 45 Atl. 135; *Cotting v. De Sartiges*, 17 R. I. 668, 24 Atl. 530, 16 L. R. A. 367. Where one having a life estate in land, and a power of conveying the fee, executes a conveyance purporting to convey the fee, an intention to execute the power is shown. *Young v. Sheldon*, 139 Ala. 444, 36 South. 27, 101 Am. St. Rep. 44.

tain no express reference to the power.⁴⁶ But a general residuary clause in the will of one having a general power of appointment by will does not operate as an exercise of such power, in the absence of statute, if the intent of the testator does not otherwise appear in any way.⁴⁸

Power to Dispose of Property by Will

The power to dispose of property by will is most commonly given to a life tenant of the land in question. This power may be conferred in terms,⁴⁷ or by implication, as where property in which a son had a life estate "is to be disposed of, at the decease of my son, to his heirs, as he shall direct."⁴⁸ The intention to create a power of this sort must, however, explicitly appear. A power of disposition given in general terms, as where a life tenant is given "full power to use and dispose of the property as she may deem right and proper,"⁴⁹ is not sufficient; and when a gift is made to a wife, subject to her sole management and control, the remainder, after her death, to be disposed of by the executors in a certain manner, her power of disposal must be exercised by her during her life, it not including the power to devise the remainder.⁵⁰ But where property was given to a wife for life, with power to give away a certain amount, the same as if the property were her own, the wife could dispose of this amount by will.⁵¹ And a power of appointment "to such persons" as donee directs is not limited to natural persons, but includes a foreign charitable corporation.⁵²

Where a donee fails to execute a power to appoint among certain objects, although testator's intention that such objects shall take appears and there is no gift in default of appointment, the

⁴⁶ See *Richardson v. Woodbury*, 43 Me. 206; *Hassam v. Hazen*, 156 Mass. 93, 30 N. E. 469; *Cooper v. Haines*, 70 Md. 282, 17 Atl. 79.

Statutes have quite generally been enacted to the effect that general devises or bequests are construed as including real or personal property over which the testator may have had a general power of appointment. 1 Vict. c. 26, § 27, is the prototype of most of such statutes. See *Lockwood v. Mildeberger*, 159 N. Y. 181, 53 N. E. 803.

⁴⁸ *Harvard College v. Balch*, 171 Ill. 275, 49 N. E. 543; *Meeker v. Breintnall*, 38 N. J. Eq. 345; *Mason v. Wheeler*, 19 R. I. 21, 31 Atl. 426, 61 Am. St. Rep. 734. Contra: *Stone v. Forbes*, 189 Mass. 163, 75 N. E. 141; *Emery v. Haven*, 67 N. H. 503, 35 Atl. 940.

⁴⁷ *Watson v. Watson*, 21 Tex. Civ. App. 348, 51 S. W. 1105; *Clay v. Smallwood*, 100 Ky. 212, 38 S. W. 7.

⁴⁸ *Phelps v. Phelps*, 143 Mass. 570, 10 N. E. 452.

⁴⁹ *Ford v. Ticknor*, 169 Mass. 276, 47 N. E. 877.

⁵⁰ *Wooster v. Fitzgerald*, 61 N. J. Law, 368, 39 Atl. 679.

⁵¹ *In re Warner*, 53 App. Div. 565, 65 N. Y. Supp. 1022.

⁵² *Farmers' Loan & Trust Co. v. Shaw*, 56 Misc. Rep. 201, 107 N. Y. Supp. 337, aff. 127 App. Div. 656, 107 N. Y. Supp. 337, 111 N. Y. Supp. 1118.

persons designated as objects of the power are entitled in equity to an equal distribution.⁵³

Power of Disposal in Tenant for Life

It frequently happens that testators, realizing that the life estate given to a beneficiary may be insufficient to provide for his needs, annex to the devise a power of disposition, either general or under restrictions. The effect of the conferring of such powers upon the life tenant has already been discussed at length in other connections.⁵⁴ A devise of property to a wife for life, "with full power to sell the property if she sees proper," with remainder over of "what may have been left," gives the life tenant a power to pass the fee by sale.⁵⁵ The power, once exercised, defeats the life estate, and consequently any liens thereon obtained against the life tenant.⁵⁶ Where the power of sale given to the donee is not restricted, the donee may convey the fee, although he has a private estate amply sufficient for his support.⁵⁷ But when a life estate is given for the support of the beneficiary, with power of sale, if necessary for his support, the power can be exercised for that purpose only, and the donee of the power cannot give away the property, as against those to whom it is limited over.⁵⁸ Powers of this character are purely personal, and the creditors of the donee gain no rights therein, in the absence of the exercise of the power by the beneficiary.⁵⁹

Miscellaneous

A power of appointment may be created to be exercised by donees not in existence at the testator's death.⁶⁰ Where a power of

⁵³ *Loosing v. Loosing*, 85 Neb. 66, 122 N. W. 707, 25 L. R. A. (N. S.) 920; *Smith v. Floyd*, 140 N. Y. 337, 35 N. E. 606; *Derse v. Derse*, 103 Wis. 113, 79 N. W. 44 (statute).

⁵⁴ See ante, p. 422.

⁵⁵ *Fink v. Lelsman* (Ky.) 38 S. W. 6. *Semble*: *Simpkins v. Bales*, 123 Iowa, 62, 98 N. W. 580; *Woodbridge v. Jones*, 183 Mass. 549, 67 N. E. 878; *Rutter v. Anderson*, 48 W. Va. 215, 36 S. E. 357; *Smith v. McIntyre*, 95 Fed. 585, 37 C. C. A. 177.

Under such a power, the life tenant may sell the remainder while reserving to himself a life estate. *Priest v. McFarland* (1914) 262 Mo. 229, 171 S. W. 62.

⁵⁶ *Rose v. Hatch*, 125 N. Y. 427, 26 N. E. 467.

⁵⁷ *Dana v. Dana*, 185 Mass. 156, 70 N. E. 49 (where donee permitted to exercise power to secure funds for charitable objects).

⁵⁸ *Gardner v. Whitford*, 23 R. I. 396, 50 Atl. 642.

So, a conveyance without money consideration was held void, although life tenant authorized to convey "at any time that she may think best, and to her best interest." *Tallent v. Fitzpatrick*, 253 Mo. 10, 161 S. W. 689.

⁵⁹ *Ryan v. Mahan*, 20 R. I. 417, 39 Atl. 893.

⁶⁰ *Meldon v. Devlin*, 20 Misc. Rep. 56, 45 N. Y. Supp. 333.

sale is given to effect purposes which are partially invalid it may be properly executed for the purpose of carrying out the provisions of the will so far as they are valid.⁶¹ An order of court settling an estate and discharging the executor does not revoke a power, vested in the executor by the will, to sell testator's land for the purpose of distributing the proceeds among the beneficiaries named.⁶²

⁶¹ *Jones v. Kelly*, 170 N. Y. 401, 63 N. E. 443.

⁶² *Starr v. Willoughby*, 218 Ill. 485, 75 N. E. 1029, 2 L. R. A. (N. S.) 623, 11 Prob. Rep. Ann. 220.

CHAPTER XX

LEGACIES—GENERAL—SPECIFIC—DEMONSTRATIVE—CUMULATIVE—LAPSED AND VOID—ABATEMENT—ADEMPTION—ADVANCEMENTS

- 145-150. General, Specific, Demonstrative, and Cumulative Legacies.
- 151. Abatement of Legacies.
- 152. Ademption and Satisfaction of Gifts.
- 153. Advancements.
- 154-155. Lapsed Gifts.
- 156-157. Void Gifts, and Property Undisposed of by Will.

GENERAL, SPECIFIC, DEMONSTRATIVE, AND CUMULATIVE LEGACIES

- 145. A general legacy is one which is payable out of the general assets of the testator's estate, and which does not require the delivery of any particular thing, or the payment of money from any particular portion of the estate.
- 146. A specific legacy is a gift of some definite, specific thing, capable of being designated and identified.
- 147. A demonstrative legacy is one of a certain amount or quantity, the particular fund or personal property being pointed out from which it is to be paid or taken.
- 148. A specific legacy differs from a general legacy—
 - (a) In that it does not in the first instance abate in case the estate is insufficient to pay debts and legacies in full.
 - (b) In that there is no recourse for its payment to the general estate in event of ademption.
- 149. A demonstrative legacy differs from a general legacy in that it does not in the first instance abate upon a deficiency of assets, and from a specific legacy in that there is recourse for its payment to the general estate in case the designated fund or property fails.
- 150. A legacy given in addition to another legacy is cumulative; when given in lieu of another it is substitutional. Whether a legacy is one or the other is purely a question as to the testator's intention. In the absence of internal evidence as to what this is, the legacies are cumulative when they are of unequal amounts and created by the same instrument, or when they are given simpliciter by different instruments, regardless of amount.

In one form and another the substance of the above definitions is given for these legacies.¹ The intention of the testator, as ascertained from an examination of the entire will, is decisive in determining to which of these classes a given legacy belongs.²

General Legacies.

In view of the liability of a specific legacy to destruction by ademption,³ the courts rather incline to construe a legacy as general rather than specific.⁴ Pecuniary legacies are usually held to be general,⁵ even though the executors be requested to pay them from a certain fund as soon as collected,⁶ and though the amounts are directed to be invested in a certain way.⁷ A residuary bequest is general, though articles bequeathed are enumerated,⁸ and so is a bequest of all the testator's personalty, where certain articles are specifically excepted.⁹ Gifts of stated sums in bonds, stocks, or mortgages, with no direction to select them out of the testator's estate, and in amount greater than the securities in the testator's possession when the will was made, are also general legacies;¹⁰ and the fact that the testator had, at the time of making the will, securities equal to or greater than the amount of those bequeathed, will not, in itself, render the gift specific.¹¹ Bequests in different

¹ For the definitions in the black-letter text, see *Nusly v. Curtis*, 36 Colo. 464, 85 Pac. 846, 7 L. R. A. (N. S.) 592, 118 Am. St. Rep. 113, 10 Ann. Cas. 1134; *In re Martin*, 25 R. I. 1, 54 Atl. 589; *Gilmer's Legatees v. Gilmer's Ex'rs*, 42 Ala. 9, 16; *Walton v. Walton*, 7 Johns. Ch. (N. Y.) 258, 262, 11 Am. Dec. 456; *Addition v. Smith*, 83 Me. 551, 22 Atl. 470; 2 *Woerner*, Am. Law Administration, 966; *Roquet v. Eldridge*, 118 Ind. 147, 20 N. E. 733.

² *Spinney v. Eaton*, 111 Me. 1, 87 Atl. 378, 46 L. R. A. (N. S.) 535.

³ See post, p. 504.

⁴ *Bradford v. Haynes*, 20 Me. 105; *Walton v. Walton*, 7 Johns. Ch. (N. Y.) 258, 11 Am. Dec. 456; *Wilcox v. Wilcox*, 13 Allen (Mass.) 256; *Briggs v. Hosford*, 22 Pick. (Mass.) 288; *Wallace v. Wallace*, 23 N. H. 153; *Teel v. Hilton*, 21 R. I. 227, 42 Atl. 1111; *May v. Sherrard's Legatees*, 115 Va. 617, 79 S. E. 1026, Ann. Cas. 1915B, 1131.

⁵ *Kelly v. Richardson*, 100 Ala. 584, 13 South. 785 (a bequest of \$500 in cash to each of certain persons); *In re Martin*, 25 R. I. 1, 54 Atl. 589; *In re Marshall*, 80 Misc. Rep. 1, 141 N. Y. Supp. 540 (bequest of "\$2,000, \$1,000 in cash and \$1,000 due on a certain mortgage"); *Fagan v. Jones*, 22 N. C. 69 (a bequest of \$2,000, "or the value thereof in property").

⁶ *Byrne v. Hume*, 86 Mich. 546, 49 N. W. 576.

⁷ *Moore's Ex'r v. Moore*, 50 N. J. Eq. 554, 25 Atl. 403; *In re Hodgman's Estate*, 69 Hun, 484, 23 N. Y. Supp. 725.

⁸ *In re Martin*, 25 R. I. 1, 54 Atl. 589.

⁹ *Kelly v. Richardson*, 100 Ala. 584, 13 South. 785. So a bequest of "all moneys or legacies coming to me from any source" is a general legacy. *Dean v. Rounds*, 18 R. I. 436, 27 Atl. 515, 28 Atl. 802.

¹⁰ *Blundell v. Pope* (N. J. Ch.) 21 Atl. 456; *Palmer v. Palmer's Estate*, 106 Me. 26, 75 Atl. 130, 19 Ann. Cas. 1184.

¹¹ *Capron v. Capron*, 6 Mackey (D. C.) 340, where the bequest was "that the

sums to various legatees of "my stocks and bonds at their par value," without further description, are general legacies,¹² as is also a gift of such an amount of interest bearing securities as shall produce a certain income.¹³

Specific Legacies

If the manifest intent of the testator is that the legatee shall have a particular thing, his legacy is then specific, as where particular notes owned by the testator are bequeathed,¹⁴ or any other debt,¹⁵ or life insurance,¹⁶ or money on deposit in specified banks,¹⁷ or the testator's interest in the estate of a deceased person,¹⁸ or a sum of money to be paid by the assignment of a mortgage,¹⁹ or the proceeds of a mortgage,²⁰ or of the sale of certain real and personal property.²¹ A bequest of stock is specific, if it appears from the entire will that testator intended to pass particular designated stocks,²² as where there is a bequest of "my" stock.²³

Income from \$6,000 in bonds of the United States" should be set apart and appropriated, and the testator had at the time \$12,000 in such bonds. Accord: *EVANS v. HUNTER*, 86 Iowa, 413, 53 N. W. 277, 17 L. R. A. 308, 41 Am. St. Rep. 503, *Dunmore Cas. Wills*, 296; *Mecum v. Stoughton*, 81 N. J. Eq. 319, 86 Atl. 52 (legacies of stock aggregating exactly the number of shares owned when will executed); *In re Snyder's Estate*, 217 Pa. 71, 66 Atl. 157, 11 L. R. A. (N. S.) 49, 118 Am. St. Rep. 900, 10 Ann. Cas. 488.

¹² *In re Hadden's Will (Sur.)* 9 N. Y. Supp. 453.

¹³ *Eggleston v. Merriam*, 83 Minn. 98, 85 N. W. 937, 86 N. W. 444; *Merriam v. Merriam*, 80 Minn. 254, 83 N. W. 162.

Where a testator gave a legacy of "\$10,000 in 100 shares of some good railroad company," an unattested memorandum showing the securities to be used in paying such legacy does not form a part of the will, so as to render the legacy specific, though the memorandum is referred to in the will. *Booth v. Baptist Church*, 126 N. Y. 215, 28 N. E. 238.

¹⁴ *In re Mowry*, 16 R. I. 514, 17 Atl. 553; *In re Martin*, 25 R. I. 1, 54 Atl. 589; *In re Willett's Estate*, 57 Hun, 400, 10 N. Y. Supp. 871.

¹⁵ *Hayes v. Hayes*, 45 N. J. Eq. 461, 17 Atl. 634.

¹⁶ *In re Taller*, 147 App. Div. 741, 133 N. Y. Supp. 122, affirmed in 205 N. Y. 599, 98 N. E. 1116.

¹⁷ *Bullard v. Leach*, 213 Mass. 117, 100 N. E. 57; *Prendergast v. Walsh*, 58 N. J. Eq. 149, 42 Atl. 1049; *Barber v. Davidson*, 73 Ill. App. 441; *Crawford v. McCarthy*, 159 N. Y. 514, 54 N. E. 277.

¹⁸ *In re Tillinghast*, 23 R. I. 121, 49 Atl. 634; *In re Goodfellow's Estate*, 166 Cal. 409, 137 Pac. 12.

¹⁹ *Wheeler v. Wood*, 104 Mich. 414, 62 N. W. 577.

²⁰ *In re McMahon's Estate*, 132 Pa. 175, 19 Atl. 68; *Hazard v. Gushee*, 35 R. I. 438, 87 Atl. 201.

²¹ *Kaiser v. Brandenburg*, 16 App. D. C. 310; *In re Martin*, 25 R. I. 1, 54 Atl. 589.

²² *Harvard Unitarian Soc. v. Tufts*, 151 Mass. 76, 23 N. E. 1006, 7 L. R. A. 390; *Drake v. True*, 72 N. H. 322, 56 Atl. 749; *Gardner v. McNeal*, 117 Md.

²³ See note 23 on following page.

All devises, whether by specific description, or by residuary clauses, are generally treated as specific, except in so far as they may include real estate acquired after the execution of the will, as to which the devises are general, unless such after-acquired property is so described as to admit of its identification by the devisees.²⁴ One claiming the benefit of a specific legacy must establish the existence and identity of the subject-matter of the legacy as stated in the will.²⁵

Demonstrative Legacies

A legacy is demonstrative when it is the clearly disclosed intention of the testator that the legatee shall certainly receive the amount bequeathed.²⁶ Where there is a doubt as to testator's intention, courts incline to construe a legacy as demonstrative rather than specific.²⁷ A common instance is where a testator provides a fund to furnish a certain income for his widow, requiring that it shall be paid annually, and that securities sufficient to that end shall be selected. If the fund set aside fails to yield the required income, the deficit must be made up from the corpus of the estate.²⁸ So bequests of a certain amount to legatees, to be paid by turning over to the legatees any of the testator's stock, bonds, or other evi-

27, 82 Atl. 988, 40 L. R. A. (N. S.) 553, Ann. Cas. 1914A, 119; *In re Ferreck's Estate*, 241 Pa. 340, 88 Atl. 505.

For cases holding bequests of bonds or stock to be general, see *Blair v. Scribner*, 67 N. J. Eq. 583, 60 Atl. 211, and *In re Bergen's Estate*, 56 Misc. Rep. 92, 106 N. Y. Supp. 1038.

²⁵ *In re Martin*, 25 R. I. 1, 54 Atl. 589; *Loring v. Woodward*, 41 N. H. 391, 395; *Ford v. Ford*, 23 N. H. 212; *Kearns v. Kearns* (1910) 77 N. J. Eq. 453, 76 Atl. 1042, 140 Am. St. Rep. 575; *Brainerd v. Cowdrey*, 16 Conn. 1; *Hood v. Haden*, 82 Va. 588.

²⁴ *Kelly v. Richardson*, 100 Ala. 584, 13 South. 785; *Rice v. Rice* (Iowa, 1909) 119 N. W. 714. See *In re White*, 125 N. Y. 544, 26 N. E. 909; *Farnum v. Bascom*, 122 Mass. 282; *Blaney v. Blaney*, 1 Cush. (Mass.) 107; *Shreve's Ex'rs v. Shreve*, 10 N. J. Eq. 385.

On principle, in jurisdictions where a will may pass after-acquired real estate, personal and real estate should be placed upon the same footing, and a devise of realty should be treated as specific only when it contains a description of the estate sufficient to enable the devisee to identify it. *Wilts v. Wilts* (1911) 151 Iowa, 149, 130 N. W. 906; *In re Woodworth's Estate*, 31 Cal. 595.

²⁶ *Barber v. Davidson*, 73 Ill. App. 441. See, also, *Johnson v. Johnson*, 48 S. C. 408, 26 S. E. 722.

²⁶ *Methodist Episcopal Church v. Hebard*, 28 App. Div. 548, 51 N. Y. Supp. 546; *In re Stilphen*, 100 Me. 146, 60 Atl. 888, 4 Ann. Cas. 158.

Such legacies are a prior claim on the fund out of which they are made payable. *Dunford v. Jackson's Ex'rs* (Va.) 22 S. E. 853.

²⁷ *Gardner v. McNeal*, 117 Md. 27, 82 Atl. 988, 40 L. R. A. (N. S.) 553, Ann. Cas. 1914A, 119.

²⁸ *Merriam v. Merriam*, 80 Minn. 254, 83 N. W. 162. *Semble*: *Johnson v. Conover*, 54 N. J. Eq. 333, 35 Atl. 291.

dences of debt at their market value, and, in case these were not sufficient, the balance to be paid in money, constitute demonstrative legacies.²⁹ And legacies to be paid out of the proceeds of testator's life insurance are demonstrative, where there are no words evincing an intention to relieve the general estate from liability in case the insurance fund proves insufficient.³⁰

Cumulative and Substitutional Legacies

In the absence of internal evidence of intent, the following rules of construction first formulated by Mr. Williams,³¹ though abundantly supported by earlier cases, have been generally adopted to determine whether a legacy be cumulative or substitutional: (1) If the same specific thing is bequeathed twice to the same legatee in the same will, or in the will and again in the codicil, the legatee can claim the benefit of but one legacy.³² (2) Where two legacies of quantity, of equal amount, are bequeathed to the same legatee in one and the same instrument, the second bequest is regarded as a mere repetition, and the beneficiary takes but one legacy.³³ (3) Where two legacies of quantity, of unequal amount, are given to the same person in the same instrument, they are cumulative, and the legatee is entitled to both.³⁴ (4) Where two legacies are given simpliciter, i. e., as plain gifts without statement as to the reason or motive therefor, to the same legatee by different instruments, the

²⁹ *Baptist Female University v. Borden*, 132 N. C. 476, 44 S. E. 47, 1007. See, also, *Hibler v. Hibler*, 104 Mich. 274, 62 N. W. 361.

³⁰ *White v. White*, 73 S. C. 261, 53 S. E. 371; *Kramer v. Kramer*, 119 C. C. A. 482, 201 Fed. 248.

³¹ 2 Wms. Ex'rs, 1290.

³² *Suisse v. Lowther*, 2 Hare, 424. This proposition is obviously true. The same thing can be given away but once by a testator.

³³ *Garth v. Meyrick*, 1 Bro. C. C. 30; *Halford v. Wood*, 4 Ves. 75; *Manning v. Thesiger*, 3 My. & K. 29; *Thompson v. Betts*, 74 Conn. 576, 51 Atl. 564, 92 Am. St. Rep. 235; *In re Powell's Estate*, 138 Pa. 322, 22 Atl. 92; *Dewitt v. Yates*, 10 Johns. (N. Y.) 156, 6 Am. Dec. 326.

But the fact that legacies to a similar amount are given to the same persons by the will does not affect their right to take, as additional legacies, the proceeds of bonds, under a codicil written on the envelope containing the bonds. *In re Harrison's Estate*, 196 Pa. 576, 46 Atl. 888.

Where legacies come under this general rule, small differences in the manner of conferring the gifts will not afford internal evidence that the testator intended them to be cumulative. Thus, where the testatrix gave "to my niece, Mary Cook, the wife of John Cook, £500," and afterwards in the same will gave "to my cousin, Mary Cook, £500 for her own use and disposal, notwithstanding her coverture," the legatee was held entitled to but one legacy. *Greenwood v. Greenwood*, 1 Bro. C. C. 31, note.

³⁴ *Curry v. Pile*, 2 Bro. C. C. 225; *Windham v. Windham*, Finch, 267; *Yorkney v. Hansard*, 3 Hare, 620, 622; *Gordon v. Smith*, 103 Md. 315, 63 Atl. 479.

legacies are cumulative, whether their amounts be equal³⁵ or unequal.³⁶

If two instruments have been probated as one will, a court of construction is bound to regard them as one,³⁷ for the purpose of applying these rules, while if probate is granted, as of a will and codicil, this is conclusive of the fact of their being distinct instruments, though written on the same paper.³⁸

But these rules are resorted to only to determine an intention which is otherwise undiscoverable. They yield, or rather never appear, when the will itself contains indicia as to the testator's intent. Thus where the legacy in the codicil of a will is referred to as being in addition to one contained in the will, the two are cumulative, though they are in form identical, both being of the same amount of stock of a certain corporation.³⁹ So where the testator left a legacy of "\$50,000, inclusive of the note of the" legatee held by the testator, the note was treated as part of the legacy of \$50,000, and not additional thereto.⁴⁰ If in the two instruments the motive of the gift is expressed, and in both the motive and the amount of the legacy are the same, it is presumed that the testator by the second instrument meant only a repetition of the former gift.⁴¹ But no such presumption exists if the sums are the same and the motives different.⁴²

A substituted legacy is *prima facie* payable out of the same funds, and is subject to the same incidents and conditions, as is the orig-

³⁵ *Lee v. Pain*, 4 Hare, 216; *Forbes v. Lawrence*, 1 Coll. 495; *Benyon v. Benyon*, 17 Ves. 34; *Roch v. Callen*, 6 Hare, 531; *Hartwell v. Martin*, 71 N. J. Eq. 157, 63 Atl. 754.

³⁶ *Gordon v. Hoffman*, 7 Sim. 29; *Guy v. Sharp*, 1 My. & K. 589; *Watson v. Reed*, 5 Sim. 431; *Mackenzie v. Mackenzie*, 2 Russ. 272.

A legacy given by a codicil will not be regarded as a substitute for one given by the will, but as cumulative, unless there is intrinsic evidence in the will or codicil of the testator's intention that a substitution shall take place. *Appeal of Manifold*, 126 Pa. 508, 19 Atl. 42. See, however, *Gould v. Chamberlain*, 184 Mass. 115, 68 N. E. 39, where court admitted parol evidence to show that testator intended smaller legacies in a codicil to be substitutional, because his estate had so diminished that it was insufficient to carry out the provisions of his will. On principle, this evidence should have been excluded, since it was offered to rebut a literal construction of the documents.

³⁷ *Brine v. Ferrier*, 7 Sim. 549; *Hemming v. Clutterbuck*, 1 Bligh (N. S.) 491. See *Utley v. Titcomb*, 63 N. H. 129, as illustrative of these rules.

³⁸ *Baillie v. Butterfield*, 1 Cox, 392; *Campbell v. Radnor*, 1 Bro. C. C. 272; *Martin v. Drinkwater*, 2 Beav. 215.

³⁹ *In re Sponsler's Appeal*, 107 Pa. 95.

⁴⁰ *In re Pepper's Estate*, 154 Pa. 340, 25 Atl. 1063.

⁴¹ *Hurst v. Beach*, 5 Madd. 358; *Benyon v. Benyon*, 17 Ves. 34.

⁴² *Hurst v. Beach*, 5 Madd. 359; *Lord v. Sutcliffe*, 2 Sim. 273.

inal legacy,⁴³ and the same rule applies to a legacy in terms additional to one already made.⁴⁴

Where a presumption is raised against the intention of a double gift, by reason of the fact that two legacies of the same amount are bequeathed to one legatee in the same instrument, or because the sums and the motive are the same in different instruments giving a legacy to the same legatee, parol evidence, including testator's declarations, are admissible to rebut the equitable presumption and to uphold the literal interpretation of the document.⁴⁵

ABATEMENT OF LEGACIES

151. Abatement is the reduction of a legacy, general or specific, on account of the insufficiency of the estate of the testator to pay his debts and legacies. In the absence of an indicated intent on the part of the testator as to the order of abatement, a bequest of the residuum abates before general bequests, and general bequests, unless, according to some authorities, they rest upon a consideration, before specific and demonstrative bequests.

No question of abatement can arise when the testator's estate is adequate to meet the calls of his creditors and those of the will. In event of its inadequacy, the testator may provide as to where the burden of the deficiency shall fall, as this is but another form of disposing of his estate, and the loss must be borne by those on whom he places it.⁴⁶ Thus he may provide that the legacies shall take priority in the order in which they appear in the will,⁴⁷ or that certain indicated legacies shall be paid in full and others abate,⁴⁸ or that the share of the wife shall not fall below a certain amount,⁴⁹ in which case the wife's interest to that extent will not abate unless it be necessary for the payment of debts, or that spe-

⁴³ *In re De Laveaga's Estate*, 119 Cal. 651, 51 Pac. 1074.

⁴⁴ *Id.*; *Thompson's Adm'r v. Churchill's Estate*, 60 Vt. 371, 14 Atl. 699.

⁴⁵ *Wigmore on Ev.* § 2475; *Hurst v. Beach*, 5 Madd. 351.

⁴⁶ *Chester County Hospital v. Hayden*, 83 Md. 104, 34 Atl. 877; *Bartlett v. Houdlette*, 147 Mass. 25, 16 N. E. 740; *Babbidge v. Vittum*, 156 Mass. 38, 30 N. E. 77; *McLean v. Robertson*, 126 Mass. 537; *Bancroft v. Bancroft*, 104 Mass. 226; *Lyon v. Brown University*, 20 R. I. 53, 37 Atl. 309.

⁴⁷ *Rexford v. Bacon*, 195 Ill. 70, 62 N. E. 936.

⁴⁸ *Methodist Episcopal Church v. Hebard*, 28 App. Div. 548, 51 N. Y. Supp. 546.

⁴⁹ *In re Phillips' Estate*, 18 Mont. 311, 45 Pac. 222.

cific legacies shall abate along with general legacies,⁵⁰ or that certain specific legacies shall bear the burden of the loss for the benefit of others of that class.⁵¹

In the absence of expressed intention, in event of a deficiency, the burden first falls upon the residuary estate, and the residuary legatee has no right to call upon the general legatees to abate, though the entire residuum be exhausted;⁵² for there is, of course, no residuum until the testator's debts are paid. This rule is applied, even though there was a large residuum at testator's death, but, because of misappropriation, the assets became insufficient to pay general legacies.⁵³ But where the will gave the executor five years to settle the estate and provided, "should my estate diminish in value, then my legacies shall be decreased in proportion," the testator's intent is evident, and in event of decrease all the legacies decrease proportionately, and not the residuary legacy alone.⁵⁴

The residuum exhausted, the burden of a deficiency next falls upon the general legacies, as against specific and demonstrative bequests, and they abate proportionately or pro rata,⁵⁵ and in this respect there is no difference between legacies to individuals and to public charities.⁵⁶ Where, however, a general legacy is sustained by a valuable consideration, such as the relinquishment of

⁵⁰ *Moore's Ex'r v. Moore*, 50 N. J. Eq. 554, 25 Atl. 403.

⁵¹ *Richardson v. Hall*, 124 Mass. 228, 233.

⁵² *In re Martin*, 25 R. I. 1, 54 Atl. 589; *Baker v. Farmer*, L. R. 3 Ch. App. 537; *Harley v. Moon*, 1 Dr. & Sm. 623; *Fonnereau v. Poyntz*, 1 Bro. C. C. 478; *Purse v. Snaplin*, 1 Atk. 418.

See, also, *Robertson v. Broadbent*, L. R. 8 App. Cas. 812.

But where \$1,300 was given in trust for the testator's brother for life, when \$500 was to go to T., and the remainder to others equally, and part of the \$1,300 was taken to pay the debts of the testator, the gift of the \$800 was not a gift of the residue, in the ordinary sense of the term; and it was held that the share of T. should abate with that of the others. *Van Nest v. Van Nest*, 43 N. J. Eq. 126, 13 Atl. 179.

⁵³ *Baker v. Farmer*, L. R. 3 Ch. App. 537.

⁵⁴ *In re Spencer*, 16 R. I. 25, 12 Atl. 124.

⁵⁵ *Capron v. Capron*, 6 Mackey (D. C.) 340; *In re Parsons' Estate* (1911) 150 Iowa, 230, 129 N. W. 955; *Porter v. Howe*, 173 Mass. 521, 54 N. E. 255; *Wetmore v. St. Luke's Hospital*, 56 Hun, 313, 9 N. Y. Supp. 753; *Ellis v. Aldrich*, 70 N. H. 219, 47 Atl. 95; *Morse v. Tilden*, 35 Misc. Rep. 560, 72 N. Y. Supp. 30; *Pond v. Allen*, 15 R. I. 171, 2 Atl. 302; *Nickerson v. Bragg*, 21 R. I. 296, 43 Atl. 539; *Wood v. Hammond*, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198; *Heath v. McLaughlin*, 115 N. C. 398, 20 S. E. 519.

⁵⁶ *Wetmore v. St. Luke's Hospital*, 56 Hun, 313, 9 N. Y. Supp. 753; *Porter v. Howe*, 173 Mass. 521, 54 N. E. 255.

See, also, *Ellis v. Aldrich*, 70 N. H. 219, 47 Atl. 95.

a debt,⁵⁷ or of a claim for dower,⁵⁸ and the right to the claim constituting the consideration subsists at the testator's death, the legatee is entitled to full payment as against other general legatees who take merely of the testator's bounty.⁵⁹ On principle, and by weight of authority,⁶⁰ a general legacy of this character should have priority over a specific legacy, unsupported by a consideration. The burden of proving that a general legacy is entitled to priority is on him who asserts it.⁶¹

Specific legacies do not abate unless the residuum and the amount available for the payment of general legacies have been exhausted in the payment of debts.⁶² In this event they abate pro rata.⁶³ A demonstrative legacy is entitled to priority over general legacies.⁶⁴ However, to the extent that the fund from which it is to be paid

⁵⁷ *Clayton v. Clayton*, 38 Ga. 320, 330; *McLean v. Robertson*, 126 Mass. 537; *Turner v. Martin*, 7 De G., M. & G. 429; *Duncan v. Franklin Tp.*, 43 N. J. Eq. 143, 10 Atl. 546; *Reynolds v. Reynolds*, 27 R. I. 520, 63 Atl. 804.

The fact that will recites that a legacy is given in consideration of services rendered testator, when services were rendered gratuitously, does not entitle legacy to priority. *Matthews v. Targarona*, 104 Md. 442, 65 Atl. 60, 10 Ann. Cas. 153. And where legacy was given in satisfaction of an ascertained debt for a smaller sum, the legacy was denied priority. *In re Wedmore* (1907) 2 Ch. 277, 76 L. J. Ch. N. S. 486, 2 B. R. C. 502.

⁵⁸ *In re Forepaugh's Estate*, 199 Pa. 484, 49 Atl. 236; *Pope v. Pope*, 209 Mass. 432, 95 N. E. 864; *Pollard v. Pollard*, 1 Allen (Mass.) 490; *Plum v. Smith*, 70 N. J. Eq. 602, 62 Atl. 763; *In re Brooks*, 2 Con. Sur. 172, 10 N. Y. Supp. 20; *Ellis v. Aldrich*, 70 N. H. 219, 47 Atl. 95.

⁵⁹ *Duncan v. Franklin Tp.*, 43 N. J. Eq. 143, 10 Atl. 546.

Expressions such as that a legacy is given to an executor "for his care and pains" (*Heron v. Heron*, 2 Atk. 171); for his "trouble in the management of the estate" (*Duncan v. Watts*, 16 Beav. 204); for his "services in assisting me at various times" (*Duncan v. Franklin Tp.*, *supra*)—do not indicate an intended preference. A legacy in lieu of dower is not preferred unless the testator had real estate wherein the widow was entitled to dower. *Moore v. Alden*, 80 Me. 301, 14 Atl. 199, 6 Am. St. Rep. 203; *Borden v. Jenks*, 140 Mass. 562, 5 N. E. 623, 54 Am. Rep. 507. A bequest to a priest to say masses has been held not to abate. *Sherman v. Baker*, 20 R. I. 613, 40 Atl. 765.

⁶⁰ *Borden v. Jenks*, *supra*; *Clayton v. Clayton*, 38 Ga. 320; *Loock v. Clarkson*, 1 Desaus. (S. C.) 471.

Contra: *Warren v. Morris*, 4 Del. Ch. 289.

⁶¹ *Duncan v. Franklin Tp.*, 43 N. J. Eq. 143, 10 Atl. 546.

⁶² *Sykes v. Van Bibber*, 88 Md. 98, 41 Atl. 117; *Stevens v. Fisher*, 144 Mass. 114, 10 N. E. 803; *Wallace v. Wallace*, 23 N. H. 149; *Page v. Eldredge Public Library*, 69 N. H. 575, 45 Atl. 411; *McFadden v. Hefley*, 28 S. C. 317, 5 S. E. 812, 13 Am. St. Rep. 675; *Wood v. Hammond*, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198; *In re Tunno*, 45 Ch. Div. 66.

⁶³ *Tomlinson v. Bury*, 145 Mass. 346, 14 N. E. 137, 1 Am. St. Rep. 464; *Farnum v. Bascom*, 122 Mass. 282; *Van Nest v. Van Nest*, 43 N. J. Eq. 126, 13 Atl. 179.

⁶⁴ *Baptist Female University v. Borden*, 132 N. C. 476, 44 S. E. 47, 1007; *Myers v. Myers*, 88 Va. 131, 13 S. E. 346.

fails to satisfy it, a demonstrative legacy stands on the footing of general legacies, and abates proportionally with them.⁶⁵ Demonstrative legacies, so far as the fund upon which they are charged will extend for their payment, abate ratably with specific legacies.⁶⁶

Under statutes subjecting realty to liability for the testator's debts, it is sometimes held that general and specific devises stand on the same footing as general and specific legacies in regard to abatement.⁶⁷ There is no abatement of a legacy given by the testatrix in the exercise of a power of appointment until the donee's own property is first exhausted.⁶⁸

ADEMPTION AND SATISFACTION OF GIFTS

152. The ademption of a bequest is effected when, by some act of the testator, its subject-matter has ceased to exist in the form in which it is described in the will, so that on his death there is nothing answering the description to be given to the beneficiary; or when the testator, during his life, satisfies the gift, either in whole or in part, by giving the beneficiary what was designed for him under the will. Ademption, in its first form, can apply only to specific gifts.

There is obviously an intrinsic difference between the ademption of a gift as first described and its satisfaction. But the term "ademption" is broadly applied to both cases, and the effect of ademption, in its strict sense, and of satisfaction upon the rights of the beneficiaries, is substantially the same. It is also clear that ademption by the change or destruction of the subject-matter of the gift can affect only specific legacies,⁶⁹ at least so far as

⁶⁵ *Gelbach v. Shively*, 67 Md. 498, 10 Atl. 247; *Dunn's Ex'rs v. Renick*, 40 W. Va. 349, 22 S. E. 66.

⁶⁶ *O'Day v. O'Day*, 193 Mo. 62, 91 S. W. 921, 4 L. R. A. (N. S.) 922.

⁶⁷ *Kelly v. Richardson*, 100 Ala. 584, 13 South. 785; *Farnum v. Bascom*, 122 Mass. 282, 287; *O'Day v. O'Day*, supra; *Brant v. Brant*, 40 Mo. 266, 280; *In re Woodworth's Estate*, 31 Cal. 595; *Armstrong's Appeal*, 63 Pa. 312. And see *Logan v. Logan*, 11 Colo. 44, 17 Pac. 99.

Contra: *Golder v. Chandler*, 87 Me. 63, 32 Atl. 784; *Gordon v. James*, 86 Miss. 719, 39 South. 18, 1 L. R. A. (N. S.) 461; *Edmunds' Adm'r v. Scott*, 78 Va. 720.

Much depends, in this matter, upon the wording of each statute.

⁶⁸ *Tuell v. Hurley*, 206 Mass. 65, 91 N. E. 1013; *White v. Institute of Technology*, 171 Mass. 84, 50 N. E. 512.

⁶⁹ *Nusly v. Curtiss*, 36 Colo. 464, 85 Pac. 846, 7 L. R. A. (N. S.) 592, 118 Am. St. Rep. 113, 10 Ann. Cas. 1134; *Mahoney v. Holt*, 19 R. I. 660, 36 Atl. 1

the right of payment is concerned; for a general legacy takes effect out of no particular fund, and a demonstrative legacy, in event of the failure of the property out of which it is payable, has recourse to the estate in general.⁷⁰

Ademption by Change or Destruction of Subject-Matter

If a debt specifically bequeathed be received by the testator, the legacy is adeemed, as nothing remains to which the words of the will can apply.⁷¹ So ademption results pro tanto where a testatrix bequeaths her interest in her mother's estate, and afterwards receives and uses a portion thereof,⁷² or where testator bequeaths insurance policies of which he is beneficiary and later receives the proceeds of the policies,⁷³ or where a portion of the subject-matter of a specific legacy has been parted with by the testator,⁷⁴ as in the case of the alienation or change of a part of stock specifically bequeathed.⁷⁵ But there is no ademption if the fund or stock or debt be converted or the testator's interest in it be changed by statute

⁷⁰ Ante, p. 498; *Ives v. Canby* (C. C.) 48 Fed. 718.

⁷¹ *Succession of Batchelor*, 48 La. Ann. 278, 19 South. 283 (where the testator bequeathed a note, the amount of which was subsequently collected and placed to his credit); *Tolman v. Tolman*, 85 Me. 317, 27 Atl. 184 (where a testator, after bequeathing certain notes secured by a mortgage, surrendered the notes and took a deed of the land, which he afterwards sold, taking notes in payment. Held, that the bequest was adeemed); *IN RE BRIDLE* (1879) 4 C. P. D. 336, *Dunmore Cas. Wills*, 302; *Richards v. Humphreys*, 15 Pick. (Mass.) 133; *Georgia Infirmary v. Jones* (C. C.) 37 Fed. 750; *Ford v. Ford*, 23 N. H. 218; *Gilbreath v. Alban*, 10 Ohio, 64; *Badrick v. Stevens*, 3 Bro. C. C. 431; *Barker v. Rayner*, 5 Madd. 208. Contra: *Joynes v. Hamilton*, 98 Md. 665, 57 Atl. 25.

But where the testatrix bequeathed all her money on hand and all bonds left her by her late husband to certain legatees, and one of the bonds was paid before the testator's death, and the amount deposited in a bank, there was no ademption as to the bond paid. *In re Bradley's Will*, 73 Vt. 253, 50 Atl. 1072.

It makes no difference whether the debt is paid voluntarily or under legal compulsion. *Wyckoff v. Perrine's Ex'rs*, 37 N. J. Eq. 118 (disapproving *Stout v. Hart*, 7 N. J. Law, 414); *Humphries v. Humphries*, 2 Cox, 165; *Jones v. Southall*, 32 Beav. 31; *Ford v. Ford*, 23 N. H. 212. The earlier English cases were otherwise, however. See 2 Wms. Ex'rs [1324] note (p).

⁷² *In re Tillinghast*, 23 R. I. 121, 49 Atl. 634. See, accord, *In re Goodfellow's Estate*, 166 Cal. 409, 137 Pac. 12.

⁷³ *In re Pruner's Estate*, 222 Pa. 179, 70 Atl. 1000, 40 L. R. A. (N. S.) 561.

⁷⁴ *New Albany Trust Co. v. Powell*, 29 Ind. App. 494, 64 N. E. 640; *Hood v. Haden*, 82 Va. 588 (where certain bonds were disposed of by will and the testatrix afterwards sold them).

Semble: *Brady v. Brady*, 78 Md. 461, 28 Atl. 515; *Douglass v. Douglass*, 13 App. D. C. 21.

⁷⁵ *Gardner v. McNeal*, 117 Md. 27, 82 Atl. 988, 40 L. R. A. (N. S.) 553, Ann. Cas. 1914A, 119; *White v. Winchester*, 6 Pick. (Mass.) 48, 57; *Ashburner v. McGuire*, 2 Bro. C. C. 108.

or operation of law;⁷⁶ nor where the stock has been transferred into another fund by a trustee without the knowledge or consent of the testator;⁷⁷ nor where the stock is transferred, with the testator's consent, from the name of his trustee into his own;⁷⁸ nor where consols bequeathed by a testatrix, and standing in her name at her death, are transferred, under an order in lunacy, into the name of the paymaster general.⁷⁹ So no ademption is worked by the simulated transfers of property by the testator, which subsequently returns to his possession;⁸⁰ nor by an offer of sale of the property bequeathed, not accepted until after the testator's death;⁸¹ nor by the lease of a ground rent, after a specific devise thereof;⁸² nor by the renewal of notes given to secure a debt which is bequeathed.⁸³ So there is no ademption from the collection of a debt where the gift is of the proceeds of the debt and not of the debt itself.⁸⁴ If the goods in a certain locality are bequeathed, and the locality is referred to merely as an aid to their identification, their removal from that locality will not adeem the legacy if identification is possible after such removal.⁸⁵ But if the fact of locality is of the essence of the gift, their subsequent removal will work an

⁷⁶ *Walton v. Walton*, 7 Johns. Ch. (N. Y.) 258, 11 Am. Dec. 456; *Partridge v. Partridge*, Cas. temp. Talb. 226; *Bronsdon v. Winter*, Ambl. 59; *Oakes v. Oakes*, 9 Hare, 666. See, however, *Slater v. Slater* [1906] 2 Ch. 480, where a different conclusion is reached under the Wills Act.

⁷⁷ *Shaftsbury v. Shaftsbury*, 2 Vern. 747.

⁷⁸ *Dingwell v. Askew*, 1 Cox, 427.

Where testatrix bequeathed certain bank stock, and subsequently the bank consolidated with others, the former stockholders being entitled to exchange their shares for shares in the new bank, which the testatrix did, no ademption was held to result. *In re Peirce*, 25 R. I. 34, 54 Atl. 588.

And, generally, a bequest of stock is not adeemed by any alteration in the stock which is purely formal. *In re Frahm's Estate*, 120 Iowa, 85, 94 N. W. 444; *Pope v. Hinckley*, 209 Mass. 323, 95 N. E. 798; *In re Clifford's Estate*, [1912] 1 Ch. 29.

⁷⁹ *In re Wood*, [1894] 2 Ch. 577. In such a case the bequest does not take effect upon consols purchased by order of court, in behalf of the lunatic testatrix, and which never stood in her name. *Id.*

⁸⁰ *Succession of Blakemore*, 43 La. Ann. 845, 9 South. 496.

A sale of property bequeathed, followed by its repurchase, the title being in the testator at the time of his death, can obviously have no effect upon the legacy.

⁸¹ *In re Pearce*, 8 Reports, 805.

⁸² *Brady v. Brady*, 78 Md. 461, 28 Atl. 515.

⁸³ *Ford v. Ford*, 23 N. H. 212; *Gardner v. Printup*, 2 Barb. (N. Y.) 83.

⁸⁴ *Hopkins v. Gourand*, 3 Misc. Rep. 619, 23 N. Y. Supp. 189; *Clark v. Browne*, 2 Sm. & G. 524; *Littig v. Hance*, 81 Md. 416, 32 Atl. 343; *Miller's Ex'r v. Malone*, 109 Ky. 133, 58 S. W. 708, 95 Am. St. Rep. 338; *In re Black's Estate*, 223 Pa. 382, 72 Atl. 631.

⁸⁵ *Chapman v. Hart*, 1 Ves. 271; *Land v. Devoyne*, 4 Bro. C. C. 537.

ademption,⁸⁶ unless they are removed to preserve them, as from fire,⁸⁷ or by fraud, or without the testator's knowledge or authority.⁸⁸

The making of a codicil does not revive a legacy previously adeemed by the testator,⁸⁹ neither does a republication of the will.⁹⁰

Ademption by Satisfaction

A legacy may be adeemed or satisfied by a payment or transfer of property expressly made for that purpose by the testator during his lifetime,⁹¹ as where money is paid to the legatee, who gives a receipt in full discharge of the legacy,⁹² even though the sum given in satisfaction is smaller than the legacy,⁹³ or where a father makes a legacy of "\$1,000, to be paid by deducting the same from the amount the legatee owes me as evidenced by notes I hold on him," and he subsequently surrenders to the son notes to the amount of the legacy,⁹⁴ or where the amount of a legacy is advanced at the express request of the legatee.⁹⁵ But the receipt by a legatee of a certain amount in part payment of a legacy does not, to that extent, work an ademption of a legacy of the same amount under a subsequent will revoking the prior will.⁹⁶

Where ademption is effected by payments of this character, it results by force of the payment itself, and not by virtue of any contract with the legatee; hence the fact that the legatee was a married woman when she received the money and gave the receipt is immaterial as affecting the result.⁹⁷

When a legacy is given for a particular purpose, which purpose

⁸⁶ 2 Wms. Ex'rs [1326]; *Green v. Symonds*, 1 Bro. C. C. 129, note; *Heseltine v. Heseltine*, 3 Madd. 276; *Colleton v. Garth*, 6 Sim. 19.

⁸⁷ *Chapman v. Hart*, 1 Ves. 273.

⁸⁸ *Shaftsbury v. Shaftsbury*, 2 Vern. 7.

⁸⁹ *Tanton v. Keller*, 167 Ill. 129, 47 N. E. 376.

⁹⁰ *Trustees Unitarian Soc. v. Tufts*, 151 Mass. 76, 23 N. E. 1006, 7 L. R. A. 390.

In Louisville Trust Co. v. Southern Baptist Theological Seminary, 148 Ky. 711, 147 S. W. 431, it was held that a legacy once adeemed was not revived by the execution, after the ademption took effect, of another will containing the same legacy.

⁹¹ *Gallagher v. Martin*, 102 Md. 115, 62 Atl. 247; *Carmichael v. Lathrop*, 108 Mich. 473, 66 N. W. 350, 32 L. R. A. 232; *In re Johnson's Estate*, 201 Pa. 513, 51 Atl. 342.

⁹² *Cowles v. Cowles*, 56 Conn. 240, 13 Atl. 414. Semble: *Roquet v. Eldridge*, 118 Ind. 147, 20 N. E. 733; *Glasscock v. Layle* (Ky.) 53 S. W. 270.

⁹³ *In re Brown's Estate* (1908) 139 Iowa, 219, 117 N. W. 260.

⁹⁴ *Davis v. Close*, 104 Iowa, 261, 73 N. W. 600.

⁹⁵ *Hayward v. Loper*, 147 Ill. 41, 35 N. E. 225.

⁹⁶ *Jaques v. Swasey*, 153 Mass. 596, 27 N. E. 771, 13 L. R. A. 566.

⁹⁷ *Roquet v. Eldridge*, 118 Ind. 147, 20 N. E. 733.

is accomplished by the testator during his own life, the legacy is regarded as thereby adeemed;⁹⁸ as where a legacy is given to a legatee to pay the debt of another legatee in the will, and, after the execution of the will, the testator pays the debt himself.⁹⁹

So where a woman bequeathed certain legacies, and afterwards made a marriage settlement disposing of her property substantially to the legatee, the legacies were treated as adeemed to the extent of the provisions in the settlement.¹

Thus far the intention of the testator with regard to the effect of his subsequent acts upon a prior bequest is reasonably clear, and it of course governs. Room for construction or presumption only exists when a subsequent payment is made to a beneficiary, and there is nothing to indicate the testator's intention as to the effect of such payment upon his will.

Subsequent Payment, with Intention not Evidenced

In such cases courts have adopted the not wholly satisfactory rule that where a bequest is made by one standing in loco parentis to the beneficiary, and subsequent thereto payments are made by the testator to the beneficiary equal to or greater, or less than the amount of the legacy, such payments are prima facie a complete satisfaction in the one case, or a satisfaction pro tanto in the other;²

⁹⁸ Taylor v. Tolen, 38 N. J. Eq. 91; In re Johnson's Estate, 201 Pa. 513, 51 Atl. 342; Rosewell v. Bennett, 3 Atk. 77.

⁹⁹ Tanton v. Keller, 167 Ill. 129, 47 N. E. 376; Taylor v. Tolen, 38 N. J. Eq. 91, where money was given to pay the debt on a chapel, which the testator afterwards paid himself. Ademption was held to follow, though the amount paid was less than the amount of the legacy. See, however, Appeal of Kelper, 124 Pa. 193, 16 Atl. 744.

¹ Webb v. Jones, 36 N. J. Eq. 163.

² In re Youngerman's Estate, 136 Iowa, 488, 114 N. W. 7, 15 Ann. Cas. 245; Richards v. Humphreys, 15 Pick. (Mass.) 133; Weston v. Johnson, 48 Ind. 1; Carmichael v. Lathrop, 108 Mich. 473, 66 N. W. 350, 32 L. R. A. 232; Boring v. Jobe (Tenn. Ch. App.) 53 S. W. 763; Shudall v. Jekyll, 2 Atk. 518; IZARD v. HURST, 2 Freem. C. C. 224, Dunmore Cas. Wills, 303.

It seems to have been originally held that complete ademption resulted even when the subsequent payment was less than the amount of the legacy—this on the theory that the legacy is the child's portion, and that a subsequent advancement is in lieu of such portion. See Hartop v. Whitmore, 1 P. Wms. 681; Clarke v. Burgoine, 1 Dick. 353; Ex parte Pye, 18 Ves. 153. But this view is no longer recognized. See Pym v. Lockyer, 5 My. & Cr. 29; 2 Story, Eq. Jur. § 1111; Paine v. Parsons, 14 Pick. (Mass.) 318.

The question as to whether a testator is to be considered as standing in loco parentis depends upon the circumstances of each particular case. The test is whether the testator means to put himself in the situation of the lawful father of the child, with reference to the father's office and duty of making provision for the child. 2 Wms. Ex'rs [1338]. Great uncles, uncles, grandfathers, and grandmothers are not to be considered in loco parentum unless such is their intention. Id. [1339].

while, if the testator does not stand in loco parentis, such payment does not, prima facie, have any relation to the prior legacy.³ The doctrine arose from the hostility of the courts of equity towards double portions, and it finds some plausible support in the suggestion that the earlier payment is merely the anticipated performance of the ultimate duty which the parent owes his child.⁴ Although criticized,⁵ it has never been denied either in English or American jurisprudence.⁶

But the presumption that the subsequent gift by one in loco parentis is by way of advancement does not prevail where the testamentary portion is not of the same kind as the thing given;⁷ nor where the subsequent advancement depends upon a contingency and the testamentary provision is certain;⁸ nor where small sums of money are given from time to time,⁹ particularly when given to relieve the financial distress of the recipient;¹⁰ nor where a sum equal to the amount of the legacy is paid to the husband of the legatee;¹¹ nor where, in any way, the intention that a subsequent payment is not to occasion ademption is manifest.¹² In two English cases, the courts have refused to apply this doctrine of ademption where the result would be to increase the residuary gift to a legatee who is a stranger.¹³ The doctrine has no application to an

³ *Wallace v. Du Bois*, 65 Md. 153, 4 Atl. 402; *Appeal of Sprenkle* (Pa.) 15 Atl. 773; *Kramer v. Kramer*, 119 C. C. A. 482, 201 Fed. 248; *Wilson v. Smith* (C. C.) 117 Fed. 707, affirmed 61 C. C. A. 446, 126 Fed. 916 (where legatee a nephew).

⁴ *Watson v. Lincoln*, 1 Ambl. 323.

⁵ *Bigelow on Wills*, p. 372; 2 Story, Eq. Jur. § 1113.

⁶ See *Weston v. Johnson*, 48 Ind. 1, 5; *Grogan v. Ashe*, 156 N. C. 286, 72 S. E. 372, citing *Gardner on Wills* (1st Ed.) p. 569.

⁷ *Holmes v. Holmes*, 1 Bro. C. C. 555; *Davys v. Boucher*, 3 Y. & Coll. 411; *Appeal of Elliott*, 132 Pa. 164, 19 Atl. 32.

Thus the gift of a house and lot to the legatee after the date of the will does not adeem a pecuniary legacy. *Swoope's Appeal*, 27 Pa. 58.

⁸ *Spinks v. Robins*, 2 Atk. 491; 2 Wms. Ex'rs [1336].

⁹ *Watson v. Watson*, 33 Beav. 574.

¹⁰ *Carmichael v. Lathrop*, 112 Mich. 301, 70 N. W. 575.

¹¹ *Hart v. Johnson*, 81 Ga. 734, 8 S. E. 73; *In re Hall's Estate* (1907) 132 Iowa, 664, 110 N. W. 148.

¹² See *Richardson v. Eveland*, 126 Ill. 37, 18 N. E. 308, 1 L. R. A. 203; *In re Crawford*, 113 N. Y. 560, 21 N. E. 692, 5 L. R. A. 71.

Whether the doctrine applies to the bequest of the residue is in dispute. See *Van Houten v. Post*, 32 N. J. Eq. 709; 2 Wms. Ex'rs [1334], citing cases holding that it does.

Contra: *Davis v. Whittaker*, 38 Ark. 435; *Clark v. Jetton*, 5 Sneed (Tenn.) 229. Since an ademption of a legacy may now be partial as well as total, there seems to be no reason why the doctrine should not be applied to residuary gifts.

¹³ *Pumphrey v. Fryer*, [1906] 2 Ch. 230; *Meinertzen v. Walters*, L. R. 7 Ch. 670.

advance made prior to the making of the will.¹⁴ And where an advancement has been made to a beneficiary in excess of a legacy bequeathed, the beneficiary is not liable to the testator's estate for the excess, the advancement being an irrevocable gift.¹⁵

Devises as Affected by Ademption

While a conveyance to a devisee, either in whole or in part, of the land devised, cannot do otherwise than effectuate the gift either wholly or in part,¹⁶ yet the general rule is that a devise cannot be adeemed by a payment of money,¹⁷ or a conveyance of other realty,¹⁸ during the life of the testator. It is held, however, that the taking of land by eminent domain, and the retention by the owner of the money awarded therefor, constitute an ademption which will prevent the devisee of the land under a former will from taking the money on the death of the testator.¹⁹

Satisfaction of Debt by Legacy to Creditor

A legacy by a debtor to a creditor will, in the absence of any evidence of the testator's intent, be presumed to have been given in payment of the debt, if the debt was contracted prior to the making of the will, and the legacy is as great or greater than the debt.²⁰ The rule seems to have little or no foundation in reason, and is followed with reluctance.²¹ It does not apply where a debt turns out

¹⁴ *Jaques v. Swasey*, 153 Mass. 596, 27 N. E. 771, 13 L. R. A. 566; *Stichtenth v. Toph*, 23 Wkly. Law Bul. (Ohio) 126.

¹⁵ *Baker v. Safe-Deposit & Trust Co.*, 93 Md. 368, 48 Atl. 920, 49 Atl. 623.

¹⁶ *Marshall v. Rensch*, 3 Del. Ch. 239; *Rice v. Rice* (1910) 147 Iowa, 1, 125 N. W. 826, 34 L. R. A. (N. S.) 917; *Pickett v. Leonard*, 104 N. C. 326, 10 S. E. 466, where the testator devised 80 acres of a certain tract, and afterwards conveyed to the devisee 30 acres of the same tract. Held that, under the will, the devisee took so much of the 80 acres as was not included in the deed, and not 80 acres besides what he took under the deed.

¹⁷ *Campbell v. Martin*, 87 Ind. 577; *In re Brown's Estate* (1908) 139 Iowa, 219, 117 N. W. 260; *Burnham v. Comfort*, 108 N. Y. 535, 15 N. E. 710, 2 Am. St. Rep. 462.

Conversely, a legacy is not adeemed by a conveyance of land to the legatee, *Jacobs v. Button*, 79 Conn. 360, 65 Atl. 150, 12 Prob. Rep. Ann. 661; unless it is made to appear that testator intended the subsequent conveyance to operate as a satisfaction, *Carmichael v. Lathrop*, 108 Mich. 473, 66 N. W. 350, 32 L. R. A. 232.

¹⁸ *Fisher v. Keithley*, 142 Mo. 244, 43 S. W. 650, 64 Am. St. Rep. 560; *Swails v. Swails*, 98 Ind. 511.

Contra: *Hansbrough's Ex'rs v. Hooe*, 12 Leigh (Va.) 316, 37 Am. Dec. 659.

¹⁹ *Ametrano v. Downs*, 62 App. Div. 405, 70 N. Y. Supp. 833.

²⁰ *Adams v. Adams*, 55 N. J. Eq. 42, 35 Atl. 827; *Heisler v. Sharp's Ex'rs*, 44 N. J. Eq. 167, 14 Atl. 624; *Strong v. Williams*, 12 Mass. 391, 7 Am. Dec. 81; *Reynolds v. Robinson*, 82 N. Y. 103, 37 Am. Rep. 555.

²¹ *Mathews v. Mathews*, 2 Ves. 635; *Smith v. Smith*, 1 Allen (Mass). 129.

to be due on an account current,²² nor where the legacy is uncertain or contingent,²³ or if there is an express direction to pay debts,²⁴ or if there is a difference in the nature of the debt and legacy,²⁵ or in the times in which they are respectively payable,²⁶ or where the legacy is payable upon terms less advantageous to the creditor,²⁷ or where the debt accrued after the making of the will,²⁸ or where the property devised is of uncertain value,²⁹ or where the expressed purpose of the gift, strictly construed, would not include a debt due from the testator.³⁰ Satisfaction, even pro tanto, is not presumed where the amount of the legacy is less than the amount of the debt.³¹

ADVANCEMENTS

153. The doctrines pertaining to advancements have no application in the law of wills, unless the testator provides that his estate, either in whole or in part, shall descend as though he had died intestate, or unless he directs that gifts, loans, or grants be deducted, as advancements, to equalize the shares of the beneficiaries. In the first case, the usual rules respecting advancements in case of intestacy prevail; in the latter, the will of the testator is effectuated, though the gifts, loans, and grants would not have constituted advancements had there been no will.

A will is supposed to contain the final manifestation of the testator's bounty, he having in view all prior bounties to the beneficiaries; hence the will extinguishes all previous advancements, unless there is a manifest intention on the part of the testator to the contrary,³² as indicated in the black-letter text. When this intention is manifested, it, of course, controls.³³

²² *Rawlins v. Powel*, 1 P. Wms. 299; *Williams v. Orary*, 5 Cow. (N. Y.) 368.

²³ *Nicholls v. Judson*, 2 Atk. 300; *Compton v. Sale*, 2 P. Wms. 553.

²⁴ *Mitchell v. Vest* (1912) 157 Iowa, 336, 136 N. W. 1054; *Boughton v. Flint*, 74 N. Y. 476.

²⁵ *Fidelity Trust Co. v. Martin*, 158 Ky. 522, 163 S. W. 665, L. R. A. 1915B, 1156; *Perry v. Maxwell*, 17 N. C. 488.

²⁶ *Dey v. Williams*, 22 N. C. 66.

²⁷ *Stone v. Pennock*, 31 Mo. App. 544.

²⁸ *In re Enos' Estate*, 61 Misc. Rep. 594, 115 N. Y. Supp. 863; *Sullivan v. Latimer*, 38 S. C. 158, 17 S. E. 701.

²⁹ *Deichman v. Arndt*, 49 N. J. Eq. 106, 22 Atl. 799.

³⁰ *Adams v. Olin*, 61 Hun, 318, 16 N. Y. Supp. 132.

³¹ *Parker v. Coburn*, 10 Allen (Mass.) 82, 84, and cases there cited.

³² *Trammel v. Trammel*, 148 Ind. 487, 47 N. E. 925; *Bowron v. Kent*, 190 N. Y. 422, 83 N. E. 472.

³³ *In re Hayne's Estate*, 165 Cal. 568, 133 Pac. 277; *Ann. Cas.* 1915A, 926;

Testators frequently provide that advancements made to the beneficiaries shall be accounted for and charged against their shares.³⁴ When the term "advancement" is used, it is usually interpreted, as in intestacy, as meaning a present gift by a parent of a portion or all of what a child would be entitled to on the death of the donor,³⁵ but intention controls when it appears that testator intends to use the term in a popular sense and to include a debt.³⁶ Where a testator signed notes as surety for his son, with the understanding that, if compelled to pay the same, the amount should be deducted from the son's share of the estate, and some of the notes were thus paid by the testator, the payments constitute advancements.³⁷ Under a general provision that advancements shall be accounted for, the law relating to advancements in cases of intestacy applies.³⁸ Where a bequest is made to a daughter of "the advance she has received as per private account," it is to be construed in the light of conditions existing at the testator's death, and passes the balance as shown against her by the testator's account at that time.³⁹

The testator may himself fix the value at which advancements are to be reckoned,⁴⁰ and such amount controls, though there is no evidence as to what the amounts actually are.⁴¹ Where the will is silent on this question, the value is to be determined as of the time the advancement was made.⁴²

In re Bresler's Estate, 155 Mich. 567, 119 N. W. 1104 (where sums advanced to husband deducted from a legacy to wife because testator so intended); *In re Harris' Estate*, 82 Vt. 199, 72 Atl. 912.

³⁴ *Breckinridge v. Breckinridge*, 98 Va. 561, 31 S. E. 892; *Coombs v. Carne*, 236 Ill. 333, 86 N. E. 245; *In re Moore*, 61 N. J. Eq. 616, 47 Atl. 731.

Where testator conveyed land to his son's children, and the will shows that testator considered the conveyance as an advancement to the son, it will be given that effect. *Duff v. Duff's Ex'rs*, 146 Ky. 201, 142 S. W. 242.

³⁵ 2 Woerner, *Am. Law of Administration*, 1214; *Osgood v. Breed's Heirs*, 17 Mass. 356.

³⁶ *Montgomery's Trustee v. Brown* (1909) 134 Ky. 592, 121 S. W. 472.

³⁷ *In re Pickenbrock's Estate*, 102 Iowa, 81, 70 N. W. 1094.

³⁸ See *Appeal of Mengel*, 116 Pa. 292, 9 Atl. 439; *Frye v. Avritt* (Ky.) 68 S. W. 420; *Leggett v. Davison*, 131 Mich. 77, 90 N. W. 1060.

³⁹ *Vitt v. Clark*, 66 Mo. App. 214.

⁴⁰ *Ballinger v. Connable*, 100 Iowa, 121, 69 N. W. 438; *Callender v. Woodward* (Tenn. Ch. App.) 52 S. W. 756.

⁴¹ *In re Eichelberger's Estate*, 135 Pa. 160, 19 Atl. 1006, 1014.

Parol evidence is not admissible to show that the property advanced was not worth the amount at which it was valued by testator. *Buchanan v. Hunter* (1914) 166 Iowa, 663, 148 N. W. 881.

⁴² *Grattan v. Grattan*, 18 Ill. 167, 65 Am. Dec. 726; *Clark v. Wilson*, 27 Md. 693; *Jackson v. Jackson*, 28 Miss. 674, 64 Am. Dec. 114; *Ray v. Loper*, 65 Mo. 470.

Interest on Advancements

An advancement being in the nature of a gift, no interest is to be charged in determining its amount,⁴³ in the absence of an express provision to that effect in the will.⁴⁴ When debts due testator are directed to be deducted from the shares of legatees, interest is reckoned only to the date of testator's death,⁴⁵ and when it appears that testator intends an indebtedness to be treated strictly as an advancement, no interest will be charged against a legatee.⁴⁶

Debts as Advancements

A loan is not an "advancement," and hence is not included under the term when used without qualification in a will.⁴⁷ But the testator may provide that debts shall be treated as advancements,⁴⁸ in which case the statement of the amount of the debt is conclusive as against the beneficiaries.⁴⁹ A provision that a debt shall be treated as an advancement will not be defeated by a prior release of the debt,⁵⁰ or by the fact that, as a debt, it is barred by the statute of limitations,⁵¹ or because the legatee has obtained a discharge in bankruptcy in respect of the debt.⁵²

⁴³ *Baker v. Trust Co.*, 93 Md. 368, 48 Atl. 900, 49 Atl. 623; *Osgood v. Breed*, 17 Mass. 356; *Wilkins v. Wilkins*, 43 N. J. Eq. 595, 12 Atl. 620; *Davies v. Hughes*, 86 Va. 909, 11 S. E. 488.

⁴⁴ *Hays v. Freshwater*, 47 W. Va. 217, 34 S. E. 831.

⁴⁵ *Howe v. Howe*, 184 Mass. 34, 67 N. E. 639; *Taylor v. Taylor*, 145 Mass. 239, 14 N. E. 101.

⁴⁶ *Garth v. Garth*, 139 Mo. 456, 41 S. W. 238.

⁴⁷ *Ex parte Middleton*, 42 S. C. 178, 20 S. E. 34; *Woessner v. Wells* (Tex. Civ. App.) 28 S. W. 247.

See, also, *Dawson v. Macknet*, 42 N. J. Eq. 633, 8 Atl. 312.

⁴⁸ *Albert v. Albert*, 74 Md. 526, 22 Atl. 408; *Ritch v. Hawxhurst*, 114 N. Y. 512, 21 N. E. 1009; *Snider v. Snider*, 149 Pa. 362, 24 Atl. 284.

⁴⁹ *In re Eichelberger's Estate*, 135 Pa. 160, 19 Atl. 1006, 1014. See, also, *Younce v. Flory*, 77 Ohio St. 71, 83 N. E. 305.

⁵⁰ *In re Tompkins' Estate*, 132 Cal. 173, 64 Pac. 268.

⁵¹ *Baker v. Trust Co.*, 93 Md. 368, 48 Atl. 920, 49 Atl. 623.

See *Price v. Douglass*, 150 Mass. 96, 22 N. E. 583.

⁵² *Matter of Fussell*, 129 Iowa, 498, 105 N. W. 503; *Stephenson v. Norris*, 128 Wis. 242, 107 N. W. 343.

LAPSED GIFTS

154. A lapsed gift is one which fails to vest when the time for vesting arrives by reason of the incapacity or unwillingness of the beneficiary to receive it. Death of the beneficiary before that of the testator is the most common cause of lapse.
155. In event of lapse, the heirs or personal representatives of the beneficiary take nothing, except in so far as provision is made to that end by statute, but the property either passes under the residuary clause of the will or is distributed as intestate property, in the absence of an indicated intention of the testator to the contrary.

The doctrine of lapse is merely a statement of the obvious proposition that, where there is no one who can or will take that which the will undertakes to dispose of, the will must to that extent fail. The death of the beneficiary prior to that of the testator inevitably results in lapse,⁵³ where the testator fails to indicate his wishes in that event, and this is true though the deceased beneficiary is one of several residuary legatees.⁵⁴ Lapse is not prevented by reason of the fact that the gift is to one and his heirs,⁵⁵ the latter word being merely one of limitation to indicate the extent of the estate which the beneficiary is to take in event of his surviving the testator, and this whether the subject-matter of the gift be real or personal property. Where the beneficiary survives the testator and the gift vests, his death before the time of payment or enjoyment occasions no lapse, but his rights pass to his heirs or personal representatives.⁵⁶ So there is no lapse when the testator manifests his in-

⁵³ *Dorsey v. Dodson*, 104 Ill. App. 589; *Pittman v. Burr*, 79 Mich. 539, 44 N. W. 951; *In re Eells' Estate*, 239 Pa. 385, 86 Atl. 877.

⁵⁴ *Bill v. Payne*, 62 Conn. 140, 25 Atl. 354.

⁵⁵ *Wood v. Seaver*, 158 Mass. 411, 33 N. E. 587; *Bryson v. Holbrook*, 159 Mass. 280, 34 N. E. 270; *Loveren v. Donaldson*, 69 N. H. 639, 45 Atl. 715; *McKiernan v. Beardslee*, 72 N. J. Eq. 283, 73 Atl. 815; *Zabriskie v. Huyler*, 82 N. J. Eq. 697, 51 Atl. 197; *Kimball v. Chappel*, 18 N. Y. Supp. 30, 27 Abb. N. C. 437; *In re Wells*, 113 N. Y. 396, 21 N. E. 137, 10 Am. St. Rep. 457.

So, where three testatrices die simultaneously, a bequest or devise from one to the other does not take effect. *IN RE WILLBOR*, 20 R. I. 126, 37 Atl. 634, 51 L. R. A. 863, 78 Am. St. Rep. 842, *Dunmore Cas. Wills*, 304.

But where the words "or to their heirs" were interlined by the testator, after the names of certain legatees of whose death the testator was aware, and the will republished, the words were clearly words of substitution, and the heirs would take. *In re Gilmor's Estate*, 154 Pa. 523, 26 Atl. 614, 35 Am. St. Rep. 855.

⁵⁶ *Dorsey v. Dodson*, 104 Ill. App. 589; *Cook v. Hayward*, 172 Mass. 195, 51

tention to the contrary, as where he provides for a limitation over in event of the death of the first beneficiary,⁵⁷ or where the gift is to a fluctuating class, to be ascertained at the death of the testator, or at a subsequent period.⁵⁸ So a legacy given to discharge an obligation will not lapse on the legatee's dying before the testator,⁵⁹ neither does the lapse of a devise of lands charged with the payment of a legacy cause the latter to lapse.⁶⁰

Lapse may be occasioned otherwise than by the death of the beneficiary during the life of the testator, as by the refusal of the beneficiary to accept the gift,⁶¹ or by the marriage during the testator's life of a beneficiary to whom a gift has been given to enjoy so long as she remains unmarried,⁶² or by the dissolution of a corporation to which a gift is made before the testator's death.⁶³ And when the will gave to the person named as executor the power to distribute the residue of the estate to such charitable institutions as he might choose, the bequest lapsed upon the death of such person before the death of testatrix.⁶⁴

Lapse as Affected by Statute

In most jurisdictions statutes have been enacted preventing lapse upon the death of the beneficiary before that of the testator under

N. E. 1075; *Hibler v. Hibler*, 104 Mich. 274, 62 N. W. 361; *Warnen's Adm'r v. Bronson*, 81 Vt. 121, 69 Atl. 655; *Saxton v. Webber*, 83 Wis. 617, 53 N. W. 905, 20 L. R. A. 509.

If legatee survives testator, his death before the probate of the will does not cause the legacy to lapse. *Jersey v. Jersey*, 146 Mich. 660, 110 N. W. 54; *Tillson v. Holloway* (1912) 90 Neb. 481, 134 N. W. 232, Ann. Cas. 1913B, 78.

⁵⁷ *Rivers v. Rivers*, 36 S. C. 302, 15 S. E. 137.

Where will devises a life estate with remainder over, the death before testator of the one designated as life tenant simply accelerates the time when the remainder over becomes operative. *Farnsworth v. Whiting*, 102 Me. 296, 66 Atl. 831; *Thompson v. Thornton* (1908) 197 Mass. 273, 83 N. E. 880.

⁵⁸ *Gordon v. Jackson*, 58 N. J. Eq. 166, 43 Atl. 98; *Holbrook v. Harrington*, 16 Gray (Mass.) 102.

⁵⁹ *Ballard v. Camplin*, 161 Ind. 16, 67 N. E. 505; *Ward v. Bush*, 59 N. J. Eq. 144, 45 Atl. 534; *McNeal v. Pierce*, 73 Ohio St. 7, 75 N. E. 938, 1 L. R. A. (N. S.) 1117, 112 Am. St. Rep. 695, 4 Ann. Cas. 71; *Turner v. Martin*, 7 De. G., M. & G. 429.

⁶⁰ *Cady v. Cady*, 67 Miss. 425, 7 South. 216; *Gilroy v. Richards*, 26 Tex. Civ. App. 355, 63 S. W. 664.

⁶¹ *Sawyer v. Freeman*, 161 Mass. 543, 37 N. E. 942.

⁶² *Andrew v. Andrew*, 1 Colly. 690.

⁶³ *Merrill v. Hayden*, 86 Me. 133, 29 Atl. 949; *Gladding v. St. Matthew's Church*, 25 R. I. 628, 57 Atl. 860, 65 L. R. A. 225, 105 Am. St. Rep. 904, 1 Ann. Cas. 537.

⁶⁴ *Hall v. Harvey*, 77 N. H. 82, 88 Atl. 97.

certain circumstances. These statutes have already been discussed in another connection,⁶⁵ and need no further treatment here.

Disposition of Lapsed Legacies

In the absence of a general residuary clause, the subject-matter of lapsed legacies is distributed as intestate property,⁶⁶ and such is the case where a general residuary gift lapses,⁶⁷ as by the death of the residuary legatee before that of the testator,⁶⁸ or by the dissolution before the death of the testator of a corporation made residuary legatee.⁶⁹ Such is also the case where a special or restricted residuary clause is not broad enough to embrace the subject-matter of the lapsed legacy.⁷⁰ If the will contains a general residuary clause, the subject-matter of a lapsed legacy becomes a part of the residuary estate, and is distributed under the provisions of that clause,⁷¹ unless it is a residuary bequest which

⁶⁵ Ante, p. 394.

As illustrative of statutes providing that a gift shall go to the issue of a dead beneficiary, see *Smith v. Williams*, 89 Ga. 9, 15 S. E. 130, 32 Am. St. Rep. 67; *Dane v. Wynn*, 80 Ga. 673, 6 S. E. 183; *Goodwin v. Colby*, 64 N. H. 401, 13 Atl. 866; *Loveren v. Donaldson*, 69 N. H. 639, 45 Atl. 715.

As illustrative of statutes providing that the gift shall go to the issue of a deceased relative of the testator who is a beneficiary, see *Sears v. Putnam*, 102 Mass. 5; *Elliot v. Fessenden*, 83 Me. 197, 22 Atl. 115, 13 L. R. A. 37; *Keniston v. Adams*, 80 Me. 290, 14 Atl. 203; *Canfield v. Canfield*, 62 N. J. Eq. 573, 50 Atl. 471; *Schaefer v. Bernhardt*, 76 Ohio St. 443, 81 N. E. 640, 10 Ann. Cas. 919 (holding husband not a relative within such a statute); *In re Bradley's Estate*, 166 Pa. 300, 31 Atl. 96; *Mann v. Hyde*, 71 Mich. 278, 39 N. W. 78.

As to whether adopted children are "issue," under these statutes, see ante, p. 256; *Phillips v. McConica*, 59 Ohio St. 1, 51 N. E. 445, 69 Am. St. Rep. 753 (holding that they are not); *Warren v. Prescott*, 84 Me. 483, 24 Atl. 948, 17 L. R. A. 435, 30 Am. St. Rep. 370 (holding that they come within the term "lineal descendant").

⁶⁶ *Bill v. Payne*, 62 Conn. 140, 25 Atl. 354; *Magnuson v. Magnuson*, 197 Ill. 496, 64 N. E. 371; *Merrill v. Hayden*, 86 Me. 133, 29 Atl. 949; *Clark v. Cammann*, 160 N. Y. 315, 54 N. E. 709.

⁶⁷ *In re Kimball's Will*, 20 R. I. 619, 40 Atl. 847.

⁶⁸ *Wood v. Hubbard*, 31 App. Div. 635, 53 N. Y. Supp. 1119.

⁶⁹ *Brooks v. City of Belfast*, 90 Me. 318, 38 Atl. 222.

⁷⁰ *In re Kimball's Will*, 20 R. I. 619, 40 Atl. 847; *Lenz v. Sens*, 27 Tex. Civ. App. 442, 66 S. W. 110; *Williams v. McKeand*, 119 Mich. 507, 78 N. W. 553, 75 Am. St. Rep. 420.

⁷¹ *English v. Cooper*, 183 Ill. 203, 55 N. E. 687; *Clark v. Mack*, 161 Mich. 545, 126 N. W. 632, 28 L. R. A. (N. S.) 479; *City of New Orleans v. Hardie*, 43 La. Ann. 251, 9 South. 12; *In re Batchelder*, 147 Mass. 465, 18 N. E. 225; *Carter v. Board*, 144 N. Y. 621, 39 N. E. 628; *Kimball v. Chappel*, 18 N. Y. Supp. 30, 27 Abb. N. C. 437; *Riker v. Cornwell*, 113 N. Y. 115, 20 N. E. 602; *Tindall's Ex'rs v. Tindall*, 24 N. J. Eq. 512; *In re Murphy's Estate*, 184 Pa. 310, 39 Atl. 70, 63 Am. St. Rep. 802; *In re Powell's Estate*, 138 Pa. 322, 22

lapses, in which event the testator must with reference thereto be considered intestate, unless there is a provision for survivorship among the residuary legatees or a gift over in case of the death of any of them.⁷²

Disposition of Lapsed Devise

At common law the subject-matter of a lapsed devise went to the heirs of the testator as intestate property, and did not pass under a general residuary clause.⁷³ But with the enactment of statutes enabling a will to operate upon subsequently acquired realty, it is generally held that lapsed devises fall into the residuum and pass to the general residuary beneficiaries.⁷⁴

VOID GIFTS, AND PROPERTY UNDISPOSED OF BY WILL

156. A void gift is one which is incapable of taking effect from the time of making the will. The subject-matter of such a gift is governed, in its disposition, by much the same principles as prevail in the disposition of the subject-matter of a lapsed gift.

157. Property which the will does not operate to dispose of is distributed as though there had been no will.

Atl. 92; Nickerson v. Bragg, 21 R. I. 296, 43 Atl. 539; Lenz v. Sens. 27 Tex. Civ. App. 442, 66 S. W. 110; Flisk v. Attorney General, L. R. 4 Eq. 521; Rymer v. Stanfield, [1895] 1 Ch. 19.

⁷² Stetson v. Eastman, 84 Me. 366, 24 Atl. 868; Horton v. Earle, 162 Mass. 448, 38 N. E. 1135; Hard v. Ashley, 117 N. Y. 606, 23 N. E. 177; Canfield v. Canfield, 62 N. J. Eq. 578, 50 Atl. 471; Church v. Church, 15 R. I. 138, 23 Atl. 302; In re Gorgas' Estate, 166 Pa. 269, 31 Atl. 86; Kent v. Kent, 106 Va. 199, 55 S. E. 564, 12 Prob. Rep. Ann. 310.

So, where a testator, by codicil, revokes a bequest to one of the residuary legatees because of his death, but makes no disposition of the share of such legatee, it passes to the testator's next of kin, and not to the remaining residuary legatees. In re Waln's Estate, 156 Pa. 194, 27 Atl. 59.

⁷³ English v. Cooper, 183 Ill. 203, 55 N. E. 687; Cox v. Harris, 17 Md. 23; Brown v. Higgs, 4 Ves. 708.

This rule seems to have arisen because of the view that a devise to a particular person was intended as an exception from the gift to a residuary legatee, Johnson v. Hollifield, 82 Ala. 123, 2 South. 753; and because a will was treated as a present conveyance, which could not pass after-acquired real estate, Molineaux v. Reynolds, 55 N. J. Eq. 187, 36 Atl. 276.

⁷⁴ In re Upham's Estate, 127 Cal. 90, 59 Pac. 315; Thayer v. Wellington, 91 Mass. (9 Allen) 283, 85 Am. Dec. 753; Molineaux v. Reynolds, 55 N. J. Eq. 187, 36 Atl. 276; Cruikshank v. Home for the Friendless, 113 N. Y. 837, 21 N.

A void differs from a lapsed gift in that the latter is good at the time of the execution of the will, while the former, such as a gift in violation of the rule against perpetuities, is as nothing from the first.

A void bequest passes under a general residuary clause,⁷⁵ unless the void bequest is itself a residuary bequest, in which case the general rule applies,⁷⁶ and the subject-matter of the void gift is distributed as intestate property.⁷⁷ If, however, the residuum is bequeathed to a class, and the shares of certain members of the class fail by reason of their being subscribing witnesses to the will, their shares pass to the other residuary legatees.⁷⁸ A special or restricted residuary clause may be so worded as not to include void bequests, in which case their subject-matter is treated as intestate property.⁷⁹

In the absence of legislation permitting the devise of after-acquired realty, a void devise passes to the heirs of the testator, and not to the residuary legatee;⁸⁰ otherwise when there is such legislation.⁸¹ In case of a void devise, the real estate does not become personalty, as against the heirs, because the executors were authorized to convert it into money to carry out the provisions of the will.⁸²

E. 64, 4 L. R. A. 140; *Smith v. Smith*, 141 N. Y. 29, 35 N. E. 1075; *Duckworth v. Jordan*, 138 N. C. 520, 51 S. E. 109, 11 Prob. Rep. Ann. 391 (statute).

⁷⁵ *Crerar v. Williams*, 145 Ill. 625, 34 N. E. 467, 21 L. R. A. 454; *Dorsey v. Dodson*, 104 Ill. App. 589; *Dexter v. Harvard College*, 176 Mass. 192, 57 N. E. 371; *Carter v. Board*, 68 Hun, 435, 23 N. Y. Supp. 95; *Hull v. Squires*, 63 Hun, 352, 18 N. Y. Supp. 309; *In re Bonnet's Estate*, 113 N. Y. 522, 21 N. E. 139; *Peckham v. Newton*, 15 R. I. 321, 4 Atl. 758; *Prison Ass'n v. Russell's Adm'r* (1905) 103 Va. 563, 49 S. E. 966; *Gallagher v. Rowan's Adm'r*, 86 Va. 823, 11 S. E. 121; *Milwaukee Protestant Home v. Becher*, 87 Wis. 409, 58 N. W. 774. See, also, *Davis v. Davis*, 62 Ohio St. 411, 57 N. E. 317, 78 Am. St. Rep. 725.

⁷⁶ See ante, p. 370.

⁷⁷ *Powers v. Codwise*, 172 Mass. 425, 52 N. E. 525; *Booth v. Baptist Church*, 126 N. Y. 215, 28 N. E. 238; *Spencer v. Association*, 36 Misc. Rep. 393, 73 N. Y. Supp. 712; *Harrington v. Pier*, 105 Wis. 485, 82 N. W. 345, 50 L. R. A. 307, 76 Am. St. Rep. 924.

Of course, where the whole residuary clause is invalid, the residuum is distributed as intestate property. *State v. Holmes*, 115 Mich. 456, 73 N. W. 548; *Henderson v. Henderson*, 46 Hun (N. Y.) 509.

⁷⁸ *Martineau v. Simonson*, 59 App. Div. 100, 69 N. Y. Supp. 185.

⁷⁹ *Davis v. Davis*, 62 Ohio St. 411, 57 N. E. 317, 78 Am. St. Rep. 725; *Schumaker v. Grammer*, 200 Ill. 48, 65 N. E. 722.

⁸⁰ *Kelly v. Nichols*, 18 R. I. 62, 25 Atl. 840, 19 L. R. A. 413.

⁸¹ *Giddings v. Giddings*, 65 Conn. 149, 32 Atl. 334, 48 Am. St. Rep. 192; *Gallavan v. Gallavan*, 57 App. Div. 320, 68 N. Y. Supp. 30 (denying the existence of any distinction in this connection between lapsed and void devises).

⁸² *Fifield v. Van Wyck's Ex'r*, 94 Va. 557, 27 S. E. 446, 64 Am. St. Rep. 745.

Property Undisposed of by Will

Property which the testator does not undertake to dispose of, or which is not in fact disposed of by the will, as in event of the defeat of an estate upon condition or with limitation,⁸³ without limitation over, or where a life estate is created, with no disposition of the reversion,⁸⁴ descends at once as intestate property, unaffected in any way by the provisions of the will.

⁸³ Bennett v. Packer, 70 Conn. 357, 39 Atl. 739, 66 Am. St. Rep. 112; Henriques v. Sterling, 26 App. Div. 30, 49 N. Y. Supp. 1071.

⁸⁴ Oliver v. Powell, 114 Ga. 592, 40 S. E. 826; Torrey v. Peabody, 97 Me. 104, 53 Atl. 988.

CHAPTER XXI

LEGACIES CHARGED UPON LAND OR OTHER PROPERTY

158. Legacies as Charged upon the Realty.
 159. Legacies Charged upon Specific Personalty.
 160-161. Enforcement of Charge.

LEGACIES AS CHARGED UPON THE REALTY

158. Legacies are primarily payable from the personalty only, and, in event of its insufficiency, they must abate, unless, either expressly or by necessary implication, the land of the testator is charged with their payment.

A legacy is not chargeable upon real estate unless the will clearly exhibits an intent to this end,¹ either by direct language or by implication from the language employed.² The question is purely one of intent,³ each case turning upon the particular phraseology employed, and the burden of showing testator's intent to charge general legacies on realty is upon those who assert it.⁴ The gift of a legacy to be paid out of the "estate" of the testator creates a charge upon the realty,⁵ though in such case the personalty is apparently primarily liable.⁶ A devise of land subject to the condition that the devisee shall pay a certain amount to a third party is

¹ Robertson v. Broadbent, L. R. 8 App. Cas. 812; Wentworth v. Read, 61 Ill. App. 539; McVean v. Wagoner (Ky.) 58 S. W. 594; Porter v. Ford (Ky.) 7 S. W. 29; La Foy v. La Foy, 43 N. J. Eq. 206, 10 Atl. 266, 3 Am. St. Rep. 302; In re Duvall's Estate, 146 Pa. 176, 23 Atl. 231; Phillips v. Clark, 18 R. I. 627, 29 Atl. 688; Allen v. Mattison (R. I.) 39 Atl. 241; Cairns v. Smith (Tex. Civ. App.) 49 S. W. 728; Hoyt v. Hoyt, 69 N. H. 303, 45 Atl. 138.

Statutes in some jurisdictions have effected changes in the common-law rule. In re Lee Rattos' Estate, 149 Cal. 552, 86 Pac. 1107, quoting Civil Code, § 1360.

² Wentworth v. Read, 166 Ill. 139, 46 N. E. 777; In re Wallace's Estate, 234 Pa. 459, 83 Atl. 280.

³ Hogg v. Browning, 47 W. Va. 22, 34 S. E. 754.

⁴ McGoldrick v. Bodkin, 140 App. Div. 196, 125 N. Y. Supp. 101.

⁵ Hartson v. Elden, 50 N. J. Eq. 522, 26 Atl. 561; In re Lloyd's Estate, 174 Pa. 184, 34 Atl. 519; Davidson v. Coon, 125 Ind. 497, 25 N. E. 601, 9 L. R. A. 584.

See Todd v. McFall, 96 Va. 754, 32 S. E. 472.

⁶ O'Brien v. Dougherty, 1 App. D. C. 148; Longacre v. Stiver, 135 Ind. 584, 85 N. E. 900; Langworthy v. Golden, 28 Ill. App. 119; Congregational Church in White River Village v. Benedict, 62 N. J. Eq. 812, 48 Atl. 1117.

usually construed as creating a charge in the latter's favor in the absence of a limitation over,⁷ and such is commonly the case with a direction to the devisee to make such payment.⁸ So a devise of the residue after the payment of specified legacies charges their payment upon the realty passing under the residuary clause,⁹ as does also a devise of specific land to a devisee after paying,¹⁰ or provided that she shall at some time pay,¹¹ a legacy to a third party, or that the devisee shall, "in consideration" of the gift, pay certain specific legacies.¹² So a power of sale conferred upon the executors, they to make perfect title to the purchasers, without liability on the part of the latter to see to the application of the purchase money, is held to indicate an intention to charge the land with the payment of legacies.¹³ There is, of course, no room for doubt where the legacy is, in terms, made a charge upon land,¹⁴ or where the gift is made subject to a certain legacy,¹⁵ or where there is a provision that, if

⁷ *Daly v. Wilkie*, 111 Ill. 382; *Merritt v. Bucknam*, 78 Me. 504, 7 Atl. 383; *McNally v. McNally*, 23 R. I. 180, 49 Atl. 699; *Chase v. Warner*, 106 Mich. 695, 64 N. W. 730; *In re Korn's Will*, 128 Wis. 428, 107 N. W. 659.

⁸ *Wyckoff v. Wyckoff*, 49 N. J. Eq. 344, 25 Atl. 963; *Carter v. Worrell*, 96 N. C. 358, 2 S. E. 528, 60 Am. Rep. 420; *Case v. Hall*, 52 Ohio St. 24, 38 N. E. 618, 25 L. R. A. 766; *Brotzman v. Riehl*, 119 Pa. 645, 13 Atl. 483.

Contra: *Larkin v. Larkin*, 17 R. I. 461, 23 Atl. 19.

⁹ *Smith v. Jackman*, 115 Mich. 192, 73 N. W. 228; *Dunham v. Deraismes*, 165 N. Y. 65, 58 N. E. 789; *Appeal of Chilcott*, 134 Pa. 240, 19 Atl. 850; *In re Root's Will*, 81 Wis. 263, 51 N. W. 435; *TURNER v. LAIRD*, 68 Conn. 198, 35 Atl. 1124, *Dunmore Cas. Wills*, 312.

¹⁰ *Woods v. Gilson*, 178 Mass. 511, 60 N. E. 4, 61 N. E. 58; *Dean's Adm'r v. Atmore*, 3 U. S. App. 131, 1 C. C. A. 595, 50 Fed. 644.

¹¹ *Cunningham v. Cunningham*, 72 Conn. 253, 43 Atl. 1046; *Bartholomew v. Merriam*, 55 Hun, 280, 8 N. Y. Supp. 179.

¹² *Hogg v. Browning*, 47 W. Va. 22, 34 S. E. 754; *In re Wise's Estate*, 188 Pa. 258, 41 Atl. 526; *Buchanan v. Lloyd*, 88 Md. 642, 41 Atl. 1075.

¹³ *Budd v. Wilson*, 61 N. J. Eq. 246, 48 Atl. 225.

Sembla: *Smith v. Cairns*, 92 Tex. 667, 51 S. W. 498.

But where executors were authorized to sell realty, if, in their judgment, it was necessary to carry out the will, and when the will took effect the personalty was sufficient to pay debts and legacies, but, by reason of expense incurred in the contest of the will, it proved insufficient, the power to sell was held inadequate to charge the realty with the payment of the legacies. *Carberry v. Ennis*, 72 App. Div. 489, 76 N. Y. Supp. 537. See, also, *Schmidt v. Limmer*, 91 App. Div. 360, 86 N. Y. Supp. 657.

¹⁴ *Young v. Benton*, 70 N. H. 268, 46 Atl. 51; *Sherrer v. Bartlett*, 45 App. Div. 135, 60 N. Y. Supp. 1067; *Gifford v. Rising*, 51 Hun, 1, 3 N. Y. Supp. 392; *Miller's Guardian v. Miller's Trustee*, 100 Ky. 37, 37 S. W. 271; *Waterfield v. Rice*, 111 Fed. 625, 49 C. C. A. 504; *Stickel v. Crane*, 189 Ill. 211, 59 N. E. 595; *Waddell v. Waddell*, 68 S. C. 335, 47 S. E. 375; *McCarthy v. McCartie* [1897] 1 Ir. 86.

¹⁵ *Carroll v. Botsai*, 65 Miss. 350, 5 South. 823; *In re More's Estate* (1914) 179 Mich. 237, 146 N. W. 319.

there was not enough personalty to pay certain legacies, devisees should pay enough to make up the amount.¹⁶

The mere fact that some of testator's realty passes to his heir as intestate property is not enough to show an intention to charge such realty with the payment of legacies when the personalty is insufficient.¹⁷

Where a valuation is put by the will upon the real estate devised, such valuation does not subject the land to payment of the values indicated, to the executor,¹⁸ in the absence of a plain intent on the part of the testator to give the devisee the option of purchasing the land at the indicated valuation.¹⁹

Devises of property, with the duty of supporting another imposed upon the devisee, further illustrate the rules already discussed. Devises conditioned on the furnishing of such support are steadily construed as creating charges upon the land,²⁰ and so with a devise, in consideration of which support was to be furnished,²¹ or where there is a direction to this end,²² or a request manifestly intended as a direction.²³ But the expression of a mere desire that the devisee shall render support creates no charge upon the land.²⁴ The manifest tendency of the courts, however, is to favor charges for support. Thus, where the testator devised to a son the residue of his estate, "and to his care, the protection and support of my daughter" during life, and the will disclosed an intention to disinherit no child, and the daughter in question was unfitted for the

¹⁶ *Henry v. Griggs*, 89 Iowa, 543, 56 N. W. 670.

¹⁷ *Wentworth v. Read*, 166 Ill. 139, 46 N. E. 777; 2 Prob. Rep. Ann. 253; *Leigh v. Savidge*, 14 N. J. Eq. 124; *In re Cameron*, 26 Ch. D. 19, 53 L. J. Ch. 1139. See, however, *Earle v. Coberly*, 65 W. Va. 163, 64 S. E. 628, 17 Ann. Cas. 479, and *St. John's German Evangelical Lutheran Church v. Dippoldsmann*, 118 Md. 242, 84 Atl. 373 (statute).

¹⁸ *In re Knaub's Estate*, 144 Pa. 322, 22 Atl. 814; *Shenk v. Shenk*, 150 Pa. 521, 24 Atl. 680.

¹⁹ *Wyckoff v. Wyckoff*, 49 N. J. Eq. 344, 25 Atl. 963.

²⁰ *In re Ryder*, 41 App. Div. 247, 58 N. Y. Supp. 635; *In re Walters' Estate*, 197 Pa. 555, 47 Atl. 862; *Isner v. Kelley*, 51 W. Va. 82, 41 S. E. 158.

But in such case neither the devisee nor the estate devised is liable to one furnishing the required support, on his failure to do so. *McQuerry v. Wilson* (Ky.) 50 S. W. 1099.

²¹ *Outland v. Outland*, 118 N. C. 138, 23 S. E. 972.

²² *Clark v. Marlow*, 149 Ind. 41, 48 N. E. 359; *Low v. Ramsey*, 135 Ky. 333, 122 S. W. 167, 135 Am. St. Rep. 459; *Crossett v. Clements* (Miss.) 7 South. 207; *Bakert v. Bakert*, 86 Mo. App. 83. But see *Schmehl's Appeal* (Pa.) 8 Atl. 874.

²³ *Block v. Mauck* (Tenn. Ch. App.) 52 S. W. 689.

²⁴ *Perdue v. Perdue*, 124 N. C. 161, 32 S. E. 492.

management of property, the support of the daughter was held to be a charge on the residue.²⁵

Implied Intention to Charge the Realty

An intent to charge pecuniary legacies on land may be inferred when it appears that at the date of the will the personal estate was so clearly insufficient to pay the legacies that the testator must have then known that their payment could not be made without the aid of the real estate.²⁶ The mere fact that the personal estate, at a time subsequent to the making of the will, was insufficient, is not enough,²⁷ unless it be shown that there was no substantial diminution of the estate from the time of making the will. In general, in determining whether the testator intended the legacies to be charges on the realty, the fact that they far exceeded in amount the value of the personal property may be considered;²⁸ and a direction to pay a legacy without sacrificing the real property, if possible, impliedly charges the legacy upon the land.²⁹

Charges on Realty by Reason of Residuary Clause

It is thoroughly well settled that when realty and personalty are blended in one mass, and legacies are then bequeathed, the legacies become a charge upon the realty in event of the insufficiency of the

²⁵ *Bank of Florence v. Gregg*, 46 S. C. 169, 24 S. E. 64.

Semble: *Bell v. Watkins*, 104 Ga. 345, 30 S. E. 756.

A charge for support, in terms, is, of course, sufficient. See *Forbes v. Darling*, 94 Mich. 621, 54 N. W. 385; *Rose v. Eaton*, 77 Mich. 247, 43 N. W. 972; *Walker v. Downer*, 55 Hun, 75, 8 N. Y. Supp. 393; *Rivers v. Rivers*, 36 S. C. 302, 15 S. E. 137.

²⁶ *Burns v. Allen*, 89 Hun, 552, 35 N. Y. Supp. 342; *Duncan v. Wallace*, 114 Ind. 169, 16 N. E. 137; *Thayer v. Finnegan*, 134 Mass. 62, 45 Am. Rep. 285; *Fecht v. Henze* (1910) 162 Mich. 52, 127 N. W. 26, citing *Gardner on Wills*, 1st Ed. p. 584; *Stuart v. Robinson*, 80 Miss. 290, 31 South. 903, 92 Am. St. Rep. 603; *Clotilde v. Lutz*, 157 Mo. 439, 57 S. W. 1018, 50 L. R. A. 847; *Stewart v. Cryslar*, 52 App. Div. 597, 65 N. Y. Supp. 483; *McCorn v. McCorn*, 100 N. Y. 511, 3 N. E. 480; *Cole v. Proctor* (Tenn. Ch. App.) 54 S. W. 674; *Theobald v. Fugman*, 64 Ohio St. 473, 60 N. E. 606.

In New Jersey, however, the fact that the testator knew the personal property to be insufficient is a circumstance to be considered in ascertaining his intention to charge legacies on land, but it alone is not enough to effect such a charge. *Turner v. Gibb*, 48 N. J. Eq. 526, 22 Atl. 580. And, in Illinois, the rule stated in the text has not been adopted. *Haynes v. McDonald*, 252 Ill. 236, 96 N. E. 823.

²⁷ *Van Gillurve v. Becker*, 56 Misc. Rep. 157, 106 N. Y. Supp. 1080; *Burns v. Allen*, 89 Hun, 552, 35 N. Y. Supp. 342; *In re Heathcote's Estate*, 209 Pa. 522, 58 Atl. 888.

²⁸ *Price v. Price*, 52 N. J. Eq. 326, 29 Atl. 679; *Lord v. Simonson* (N. J. Ch.) 42 Atl. 741.

²⁹ *Price v. Price*, *supra*.

personalty,³⁰ and that when, after the giving of pecuniary legacies, the testator makes a general residuary disposition of the whole estate, blending the realty and personalty in one fund, such blending implies an intention to charge the legacies on the residuary real estate if the personal estate is not sufficient, and this implication prevails unless restrained or avoided by other words or provisions in the will.³¹ The blending of the two kinds of property is essential, for this indicates the testator's intention to treat both alike with regard to the payment of legacies.³² The New York cases place emphasis upon the disparity between the value of the personal property and the amount of the legacies, and the blending, alone, is not sufficient, in that jurisdiction, to establish the testator's intent to charge the legacies upon the land.³³ And the rule does not apply when, though included in the residuary clause, the real estate does not go, by that clause, to the residuary devisees in common, as a part of the general residuum, but is separated so as to go as a specific devise.³⁴ So, where a testator is compelled to dispose of personalty which he had intended should be used for the

³⁰ *Carter v. Gray*, 58 N. J. Eq. 411, 43 Atl. 711; *Perkins v. Bank*, 81 Miss. 358, 33 South. 18.

³¹ *Simonsen v. Hutchinson*, 231 Ill. 508, 83 N. E. 183; *Turner v. Gibb*, 48 N. J. Eq. 526, 22 Atl. 580; *Gorman v. McDonnell*, 127 Ala. 549, 28 South. 964; *Miller v. Cooch*, 5 Del. Ch. 161; *Brooks v. Brooks*, 65 Ill. App. 326; *Williams v. Williams*, 189 Ill. 500, 59 N. E. 966 ("all the rest, residue, and remainder of my estate"); *In re Newcomb's Will*, 98 Iowa, 175, 67 N. W. 587; *Wilson v. Foss*, 2 Neb. (Unof.) 428, 80 N. W. 300; *Stevens v. Flower*, 46 N. J. Eq. 340, 19 Atl. 777 (where the use and income of the "residue" of the estate was disposed of); *First Baptist Church of Hoboken v. Syma*, 51 N. J. Eq. 363, 28 Atl. 461; *Turner v. Gibb*, *supra* (where the residue of the estate, "real, personal, and mixed," was disposed of); *Collins' Appeal*, 148 Pa. 139, 23 Atl. 1108 (language of residuary clause same as in preceding case); *In re Markley's Estate*, 148 Pa. 538, 24 Atl. 75; *Jaudon v. Ducker*, 27 S. C. 295, 3 S. E. 465; *Hutchinson v. Gilbert*, 86 Tenn. 464, 7 S. W. 126 (where the residue of the property was disposed of); *Atmore v. Walker* (O. C.) 46 Fed. 429; *In re Dyson* [1896] 2 Ch. 720.

³² *Armentrout v. Armentrout*, 111 Va. 348, 69 S. E. 333.

Hence, where a testatrix, after giving general legacies, devised her real estate and the residue of her personalty to her husband, and she left no personal estate, the general legacies did not become a charge upon the realty. *In re Jamieson*, 18 R. I. 385, 28 Atl. 333.

³³ *Harvey v. Kennedy*, 81 App. Div. 261, 80 N. Y. Supp. 878, affirmed 177 N. Y. 553, 69 N. E. 1124; *Briggs v. Carroll*, 117 N. Y. 288, 22 N. E. 1054; *American Baptist Home Mission Soc. v. Foote*, 52 Hun, 307, 5 N. Y. Supp. 236; *Morris v. Sickly*, 133 N. Y. 456, 31 N. E. 332 (holding that after-acquired realty would not be charged with legacies under a blending residuary clause). See, also, *Pearson v. Wartman*, 80 Md. 528, 31 Atl. 446.

³⁴ *Belcher v. Belcher*, 16 R. I. 72, 12 Atl. 230.

payment of legacies, such legacies do not become a charge upon land under a blending residuary clause.³⁵

Where all the testator's personal property was given to the testator's wife, followed by specific devises, which, in turn, were followed by a legacy, and the residuary clause disposed of all the residue of the realty, the last legacy was held to be impliedly charged upon the residuary devise;³⁶ and, in general, the land is charged by implication where a legacy is given after a disposition of all the personalty, as there is then nothing else from which the legacy can be paid.³⁷

Legacies Charged upon Specific Devises

While the courts have been thus inclined to subject residuary real estate to general legacies, the tendency has been to relieve specifically devised estates from the effect of even an express charge; and it is a rule of construction that a charge of legacies on the real estate, or on all the real estate, of the testator, does not prima facie charge lands specifically devised.³⁸ So a legacy chargeable on the realty under a blending residuary clause is not a charge upon land specifically devised.³⁹ So, where a legacy is given after a disposition of all the personalty, it is chargeable upon realty as to which the testator died intestate, rather than upon that specifically devised.⁴⁰ And a direction to a daughter, to whom specific land had been devised, to pay a certain sum to another daughter, because of the fact that the devise to the latter was less in value than that to the former, is a personal charge merely, not binding on the land.⁴¹

But land specifically devised may be charged with legacies if the testator's intent to that end is unmistakable, as where they are in terms made a charge upon the land,⁴² or where the devise is sub-

³⁵ *Hindman v. Haurand*, 159 N. Y. 546, 54 N. E. 1092.

³⁶ *Reid v. Corrigan*, 143 Ill. 402, 32 N. E. 387.

³⁷ *Bigelow, Wills*, 319; *Davidson v. Coon*, 125 Ind. 497, 25 N. E. 601, 9 L. R. A. 584; *Bevan v. Cooper*, 72 N. Y. 317; *In re Hershey's Estate*, 200 Pa. 562, 50 Atl. 199.

³⁸ *Kitchell v. Young*, 46 N. J. Eq. 506, 19 Atl. 729; *Spong v. Spong*, 3 Bligh (N. S.) 84; *Conron v. Conron*, 7 H. L. C. 168; *Davenport v. Sargent*, 63 N. H. 538, 4 Atl. 569; *Worth v. Worth*, 95 N. C. 239.

Semble: *Newsom v. Thornton*, 82 Ala. 402, 8 South. 261, 60 Am. Rep. 743; *Phillips v. Clark*, 18 R. I. 627, 29 Atl. 688.

But see *McCarthy v. McCartie* [1897] 1 Ir. 86; *Bank of Ireland v. McCarthy*, 67 Law J. P. C. 13, App. Cas. 181.

³⁹ *Peet v. Peet*, 99 Iowa, 314, 68 N. W. 705; *Phillips v. Clark*, 18 R. I. 627, 29 Atl. 688.

⁴⁰ *Morey v. Morey*, 113 Iowa, 152, 84 N. W. 1039.

⁴¹ *Sauer v. Mollinger*, 138 Pa. 338, 22 Atl. 89.

⁴² *Mortgage Trust Co. of Pennsylvania v. Moore*, 150 Ind. 465, 50 N. E. 72;

ject to the devisee's paying a certain sum to the executor.⁴³ So, where the testator, after devising certain land to each of his three children, provided for the sale of the remainder of his property and its division, and then provided that, when certain grandchildren became of age, they should each receive \$500, to be paid jointly by two of the devisees, these legacies were regarded as charges upon the land devised to the latter.⁴⁴

LEGACIES CHARGED UPON SPECIFIC PERSONALTY

159. Legacies, though primarily payable from the personal property in general, may yet be made a charge upon particular funds, or upon personalty specifically bequeathed to others.

The intention of the testator is decisive in this regard.⁴⁵ If real estate be directed to be sold, and a sum of money given from the proceeds, this is not a general legacy, and the money must be paid from such proceeds, if at all.⁴⁶ So, where a will gives to an institution all the money, notes, accounts, stock, etc., which shall remain and belong to the testator's estate after the full payment of all the sums of money given by previous clauses, legacies given in such clauses must be charged to the property bestowed upon the institution, in exoneration of other property which might otherwise have been primarily liable for their payment.⁴⁷

ENFORCEMENT OF CHARGE

160. A legacy charged upon land is an equitable lien thereon, enforceable by a proceeding in equity.

161. The devisee ordinarily becomes personally liable upon accepting a gift charged with a legacy, and an action at law is then maintainable against him for its recovery.

Earnhart v. Earnhart, 127 Ind. 397, 26 N. E. 895, 22 Am. St. Rep. 652; *Nesbit v. Wood* (Ky.) 56 S. W. 714; *Emory v. Emory*, 91 Md. 531, 46 Atl. 977.

⁴³ *In re Hammond's Estate*, 197 Pa. 119, 46 Atl. 935.

⁴⁴ *Cady v. Cady*, 67 Miss. 425, 7 South. 216.

⁴⁵ See *Thurber v. Battey*, 105 Mich. 718, 63 N. W. 995, where general legacies were charged on specific.

⁴⁶ *Hancox v. Abbey*, 11 Ves. 179; *Dicken v. Edwards*, 4 Hare, 273.

⁴⁷ *Hileman v. Tuthill*, 97 Ill. App. 258.

Semle: *Woodward v. James*, 115 N. Y. 346, 22 N. E. 150; *Cowherd v. Kitchen*, 57 Neb. 426, 77 N. W. 1107.

See, also, *Loring v. Wilson*, 174 Mass. 132, 54 N. E. 502.

Legacies charged upon land ordinarily remain a lien until actual payment,⁴⁸ although sometimes legatees are denied relief, when seeking to enforce charge, because of laches⁴⁹ or because of the statute of limitations.⁵⁰ Such legacies may be enforced by a bill in equity;⁵¹ the petitioner being entitled to a decree for the sale of the land,⁵² though not if his indebtedness to the testator's estate exceeds the amount of his legacy.⁵³ Such an action will lie, though the estate has been finally settled.⁵⁴ The legatees, and not the executors, are the proper persons to sue to charge real estate with the payment of legacies,⁵⁵ but the testator's personal representatives are necessary parties defendant.⁵⁶ Purchasers from the devisee take the land subject to the charge of the legacy,⁵⁷ and, where the lands are in the hands of purchasers under mortgages executed by the devisee, they are liable in the inverse order of the dates of the mortgages.⁵⁸ A reversion or vested remainder may be sold before the expiration of the precedent estate for the satisfaction of legacies charged thereon.⁵⁹

Devisee Personally Liable

By accepting a devise charged with a legacy, the devisee ordinarily becomes personally liable therefor in quasi contract, and action may be maintained against him by the legatee to recover its amount.⁶⁰ Where a legacy is charged on all the land devised, a

⁴⁸ *Balz v. Kircher*, 192 Pa. 63, 43 Atl. 392.

⁴⁹ *Shuld v. Wilson*, 225 Ill. 336, 80 N. E. 259.

⁵⁰ *Merton v. O'Brien*, 117 Wis. 437, 94 N. W. 340.

⁵¹ *Readman v. Ferguson*, 13 App. D. C. 60; *McFarland v. McFarland*, 177 Ill. 208, 52 N. E. 281; *Hammell v. Barrett* (1911) 79 N. J. Eq. 218, 81 Atl. 1106; *Collister v. Fassitt*, 163 N. Y. 281, 57 N. E. 490, 79 Am. St. Rep. 586; *Arrington v. Arrington*, 114 N. C. 151, 19 S. E. 351.

⁵² *Steele v. Korn*, 137 Wis. 51, 118 N. W. 207, 120 N. W. 261, 129 Am. St. Rep. 1051.

⁵³ *In re Harman's Estate*, 135 Pa. 441, 19 Atl. 1021.

⁵⁴ *Davidson v. Coon*, 125 Ind. 497, 25 N. E. 601, 9 L. R. A. 584.

⁵⁵ *St. John's German Evangelical Lutheran Church v. Dippoldsmann*, 118 Md. 242, 84 Atl. 373.

The statute sometimes permits the legatee to proceed in the probate court for the enforcement of the lien of his legacy charged on land. *In re Hammond's Estate*, 197 Pa. 119, 46 Atl. 935.

⁵⁶ *Congregational Church of White River Village v. Benedict*, 59 N. J. Eq. 136, 44 Atl. 878.

⁵⁷ *Proctor Coal Co. v. Beams* (Ky.) 50 S. W. 533; *Peebles v. Acker*, 70 Miss. 356, 12 South. 248; *WILSON v. FOSS*, 2 Neb. (Unof.) 428, 89 N. W. 300, *Dunmore Cas. Wills*, 309; *Hodges v. Phelps*, 65 Vt. 303, 26 Atl. 625; *Coleman's Ex'rs v. Howell* (N. J. Ch.) 16 Atl. 202.

⁵⁸ *Wieting v. Bellinger*, 50 Hun, 324, 3 N. Y. Supp. 361.

⁵⁹ *In re Root's Will*, 81 Wis. 263, 51 N. W. 435.

⁶⁰ *Trustees of Amherst College v. Smith*, 134 Mass. 543; *Red v. Powers*, 69 Miss. 242, 13 South. 586; *Dunham v. Deraismes*, 166 N. Y. 607, 59 N. E. 903;

devisee of part of the land becomes personally liable for only his proportional share of the legacy.⁶¹ But where land is devised to sons, charged with the support of their mother, they become jointly and severally liable for such support.⁶² No demand is necessary prior to bringing suit for failure to supply support with which the land is charged.⁶³

Sommers v. Schrader, 59 App. Div. 840, 69 N. Y. Supp. 866; *In re Walters' Estate*, 197 Pa. 555, 47 Atl. 862; *Shillito v. Shillito*, 160 Pa. 167, 28 Atl. 637; *Renner v. Headley*, 129 Pa. 542, 18 Atl. 549; *Steele v. Korn*, 137 Wis. 51, 118 N. W. 207, 120 N. W. 261, 129 Am. St. Rep. 1051.

The testator may clearly indicate an intention that the devisee shall not be personally responsible. See *Eddy v. Kelly*, 72 Minn. 82, 74 N. W. 1020; *In re Semple's Estate*, 189 Pa. 385, 42 Atl. 28.

⁶¹ *Dunham v. Deraismes*, 166 N. Y. 607, 59 N. E. 903.

⁶² *Shillito v. Shillito*, 160 Pa. 167, 28 Atl. 637.

⁶³ *Watt v. Pittman*, 125 Ind. 168, 25 N. E. 191.

CHAPTER XXII

PAYMENT OF THE TESTATOR'S DEBTS

- 162-164. Debts Charged upon the Realty and Other Specific Property.
165. Exoneration of Realty and other Property from Liens Thereon.
166. Remedies of Creditors against Beneficiaries.
167. Contribution among Beneficiaries for Debts Paid by Them.

DEBTS CHARGED UPON THE REALTY AND OTHER
SPECIFIC PROPERTY

162. At common law the debts of a testator were payable only from his personal property, unless, by the will, the realty was charged therewith. Under modern statutes, all the property of a decedent passes, charged with the burden of his debts, except so far as special exemptions are made.
163. When, under the will, the realty is charged with the payment of debts, such a charge does not, of itself, exonerate the personalty which is still regarded as primarily liable. To effect such exoneration, the intention must appear, not only to charge the real estate, but to discharge the personalty.
164. The testator, by apt language, may charge the payment of his debts solely upon the realty, or specific personal property, in which event other property passing under the will, to the extent that the property so charged is sufficient for their payment, is exonerated from their payment.

The question—once so important—as to whether the testator's realty was charged by the will with the payment of his debts is, in view of modern legislation, as above indicated, of no consequence, from the standpoint of his creditors, as, homestead and other special exemptions aside, they will be paid if there is property enough with which to pay them. The matter is of significance only to the beneficiaries under the will, as determining, among themselves, upon what subject-matter of devise or bequest the burden of the testator's indebtedness will ultimately fall.

In the absence of an intention on the part of the testator to the contrary, his debts must be paid from the personal property, the legatees taking only the residue, and the realty is resorted to only

in event of insufficiency of personal assets.¹ Thus a will providing that, after the payment of the testator's debts, all the debts of his mother were to be paid out of "my estate," is construed as not intending to charge such debts upon the testator's real estate.² So, where a will which made no disposition of the personal estate, and had no residuary clause, contained a provision authorizing the executor to sell certain lands for the purpose of discharging all his debts, there was held to be no intention that the personalty should be relieved from its primary liability, and the executors could not sell the land, when they knew that there was more than enough personal property to pay the debts.³

It is frequently said that a general direction to pay debts, such as is commonly found in wills, creates a general charge of debts upon the testator's lands, but leaves the personal estate the primary fund for such payment.⁴ As this result would follow, practically, if there were no provision whatever respecting the payment of debts, the charge thus imposed, if it be one, can have no effect upon the rights of the beneficiaries as among themselves. Other cases, say that a mere general direction in a will to pay debts is not a charge upon the real estate for that purpose, and furnishes no evidence of an intent to charge it.⁵ The results of the two ways of putting the matter are substantially the same.

¹ *Steiner v. Steiner Land & Lumber Co.*, 120 Ala. 128, 26 South. 494; *Pitkin v. Peet*, 108 Iowa, 480, 79 N. W. 272; *Morse v. Hayden*, 82 Me. 227, 19 Atl. 443; *Hattersley v. Bissett*, 52 N. J. Eq. 693, 30 Atl. 86; *Appeal of Chilcott*, 134 Pa. 240, 19 Atl. 850; *In re Thompson's Estate*, 182 Pa. 340, 37 Atl. 940; *In re Martin*, 25 R. I. 1, 54 Atl. 589; *Hamm v. Hutchins*, 19 Tex. Civ. App. 209, 46 S. W. 873; *Frasler v. Littleton's Ex'rs*, 100 Va. 9, 40 S. E. 108; *In re Butler*, [1894] 3 Ch. 250; *In re Bate*, 43 Ch. Div. 600; *In re Head's Trustees*, 45 Ch. Div. 310; *IN RE BANKS*, [1905] 1 Ch. 547, *Dunmore Cas. Wills*, 311.

² *Lediger v. Canfield*, 78 App. Div. 596, 79 N. Y. Supp. 758.

³ *Sweeney v. Warren*, 127 N. Y. 426, 28 N. E. 413, 24 Am. St. Rep. 468.

⁴ *Suydam v. Voorhees*, 58 N. J. Eq. 157, 43 Atl. 4; *Decker v. Decker*, 121 Ill. 341, 12 N. E. 750; *Kiesewetter v. Kress* (Ky.) 70 S. W. 1065.

⁵ *Harmon v. Smith* (C. C.) 38 Fed. 482; *In re Bingham*, 127 N. Y. 296, 27 N. E. 1055; *In re O'Brien*, 39 App. Div. 321, 56 N. Y. Supp. 925; *Balls v. Dampman*, 69 Md. 390, 16 Atl. 16, 1 L. R. A. 545; *McGlaughlin v. McGlaughlin's Legatees*, 43 W. Va. 226, 27 S. E. 378.

As a matter of fact, there can be little question that in such cases the testator has no intention whatever as to the special form of property from which the debts are to be paid.

So the provision of a will that "all my just debts shall be paid out of the first realized assets of my estate" does not charge the payment of debts on the land, so as to give a lien prior to that of a mortgage given by the executor under a power in the will. *Ames v. Holderbaum* (C. C.) 44 Fed. 224.

The fact that the testator, after directing his executor to pay his debts,

Language Sufficient to Charge Debts upon Specific Property

The testator may, however, by making manifest his intention to that end, exonerate his personalty from liability for his debts, and charge them upon the realty. Such is the case where the whole personal estate is specifically bequeathed, and there are provisions for the payment out of the realty of all the charges which would otherwise primarily affect the personalty.⁶ So, where all the personal property is given to the widow in lieu of dower, and the dower interest takes precedence over the testator's debts, an intent to charge the debts on the realty is clearly disclosed.⁷ Where the balance of an estate, including property of whatever sort, is bequeathed, with a direction that the beneficiary shall pay all debts, such debts become a charge upon the property thus bequeathed.⁸ Debts thus made a lien upon the realty will be barred by the statute of limitations unless an express trust is created for their payment.⁹

So debts may, in terms, be charged upon the subject-matter of a specific legacy, as where all the property pertaining to a certain business is bequeathed, with a provision that the testator's debts shall be paid therefrom.¹⁰

devises the residue of his estate to him, does not render the debts a charge on the land included in the residuary devise. *Cunningham v. Parker*, 146 N. Y. 29, 40 N. E. 635, 48 Am. St. Rep. 765.

⁶*Greene v. Greene*, 4 Madd. 148; *Driver v. Ferrand*, 1 R. & My. 681; *Plenty v. West*, 16 Beav. 173; *Gilbertson v. Gilbertson*, 34 Beav. 354. See, however, *IN RE BANKS*, [1905] 1 Ch. 547, *Dunmore Cas. Wills*, 311.

⁷See *Wiggins v. Wiggins*, 65 N. J. Eq. 417, 56 Atl. 148; *Calder v. Curry*, 17 R. I. 610, 24 Atl. 103. In such cases the widow is really a purchaser for value. *Dauel v. Arnold*, 201 Ill. 570, 66 N. E. 846.

See, also, *Dunning v. Dunning*, 82 Hun, 462, 31 N. Y. Supp. 719.

⁸*Appeal of Thompson (Pa.)* 11 Atl. 455; *In re Thomas*, 2 Ont. Law Rep. 660.

⁹*In re Mitchell's Estate*, 182 Pa. 530, 38 Atl. 489.

A provision charging a debt on land is sometimes treated as creating an equitable estate. *McKinley v. Coe*, 66 N. J. Eq. 70, 57 Atl. 1030 (permitting suit within twenty years).

¹⁰*Bishop v. Howarth*, 59 Conn. 455, 22 Atl. 432; *Kelly v. Richardson*, 100 Ala. 584, 13 South. 785.

EXONERATION OF REALTY AND OTHER PROPERTY FROM LIENS THEREON

165. From the primary liability of the general personalty to satisfy the testator's debts, it follows that such debts, though secured by liens upon his realty or other property, are to be paid from the personalty, unless a contrary intention is disclosed, and that the taker of such property under the will may call upon the executor to satisfy such liens, though not at the expense of specific legatees.

This doctrine is most commonly invoked in case of devises of mortgaged realty. It is steadily held, in the absence of legislation to the contrary, that a devise of land mortgaged by the testator to secure his own debt *prima facie* imports an intention that the debt shall be satisfied out of the general personal assets.¹¹ The failure of mortgagees to present their claims against the estate of the deceased mortgagor does not, as between the devisees of the mortgaged property and the executor, discharge the latter's obligation to pay the mortgage.¹² A will of real and personal property, directing the payment of debts, and, should the income be insufficient for that purpose, authorizing the executors to sell personalty, and, should that not be enough, real estate, does not contemplate that mortgaged real estate shall be the primary fund for the payment of the mortgage debts.¹³

But the devisee of mortgaged property is not entitled to have it exonerated out of personalty specifically bequeathed,¹⁴ and, according to the prevailing view, there is no exoneration of mortgaged property as against pecuniary legacies of a fixed amount.¹⁵

¹¹ *Jacobs v. Button*, 79 Conn. 360, 65 Atl. 150; *TURNER v. LAIRD*, 68 Conn. 198, 35 Atl. 1124, *Dunmore Cas. Wills*, 312; *Bulkley v. Seymour*, 74 Conn. 459, 51 Atl. 125, 92 Am. St. Rep. 229; *Jackson v. Bevins*, 74 Conn. 96, 49 Atl. 899; *Brown v. Baron*, 162 Mass. 56, 37 N. E. 772, 44 Am. St. Rep. 331; *Hewes v. Dehon*, 3 Gray (Mass.) 205; *Higble v. Morris*, 53 N. J. Eq. 173, 32 Atl. 372; *Wells v. Wells*, 24 N. Y. Supp. 874, 30 Abb. N. C. 225; *Rafferty v. Monahan*, 22 R. I. 558, 48 Atl. 940; *Hennegar v. Deadrick* (Tenn. Ch. App.) 54 S. W. 138.

See *In re Heydenfeldt's Estate*, 106 Cal. 434, 39 Pac. 788.

¹² *TURNER v. LAIRD*, 68 Conn. 198, 35 Atl. 1124, *Dunmore Cas. Wills*, 312.

¹³ *Hale v. City of St. Paul*, 54 Minn. 421, 56 N. W. 63.

¹⁴ *Morris v. Higble* (N. J. Ch.) 27 Atl. 438; *Glass v. Dunn*, 17 Ohio St. 413; *Emuss v. Smith*, 2 De G. & S. 737.

¹⁵ *Glass v. Dunn*, 17 Ohio St. 413; *Lutkins v. Leigh* *Cas. temp. Talb.* 53; *Smith v. Smith*, [1899] 1 Ch. 365; *Howel v. Price*, 1 P. Wms. 291. And see *Gould v. Winthrop*, 5 R. I. 319.

Contra: *Brown v. Baron*, 162 Mass. 56, 37 N. E. 772, 44 Am. St. Rep. 331.

The devisee is not entitled to exoneration where testator bequeaths all his personalty to his wife in lieu of dower.¹⁶ And where the testator purchased the land already subject to the mortgage, the debt secured is payable out of the property encumbered,¹⁷ unless the testator has assumed the debt as his own, and not even then unless, under such an agreement, he is held to be personally liable to the mortgagee.¹⁸

Where a testator devises land, describing it, in terms, as subject to a mortgage, the devisee is then entitled to no exoneration from the personalty,¹⁹ though the rule was otherwise in England;²⁰ the view there being that such language is descriptive of the property, rather than of the extent of the testator's bounty. In England the common-law rule with regard to the exoneration of mortgaged realty has been changed by statute, so that no exoneration is had unless the testator shall signify an intention to that end.²¹ There can be little doubt that such legislation effectuates the real intention of the testator in most cases.

The common-law rule applies to other incumbrances upon land as well as to mortgages. Thus, where land is devised in trust, unpaid taxes assessed against the property during the testator's life are payable from the general estate, as any other indebtedness.²² And where land is devised by a vendee holding under a contract of purchase, the devisee may require the unpaid purchase price to be paid from the residuary personalty.²³

While the cases are less frequent, personal property specifically bequeathed is to be exonerated by the general personalty from all incumbrances placed upon it by the testator, in the absence of a manifest intent to the contrary.²⁴

¹⁶ *Wiggins v. Wiggins*, 65 N. J. Eq. 417, 56 Atl. 148.

¹⁷ *Creesy v. Willis*, 159 Mass. 249, 34 N. E. 265; *Hetzel v. Hetzel*, 74 N. J. Eq. 770, 71 Atl. 755; *Hoff's Appeal*, 24 Pa. 203. In such cases the mortgage debt is not the debt of the testator.

¹⁸ *Butler v. Butler*, 5 Ves. 534; *Creesy v. Willis*, 159 Mass. 249, 34 N. E. 265; *McLenahan v. McLenahan*, 18 N. J. Eq. 101; *In re Hunt*, Petitioner, 19 R. I. 139, 32 Atl. 204, 61 Am. St. Rep. 743.

¹⁹ *Jackson v. Bevins*, 74 Conn. 96, 49 Atl. 899; *Harris v. Dodge*, 72 Md. 186, 19 Atl. 597; *Langstroth v. Golding*, 41 N. J. Eq. 49, 3 Atl. 151. See, also, *Conover v. Dennis*, 63 N. J. Eq. 207, 49 Atl. 723; *Lawrence v. Hathaway*, 128 Mich. 119, 87 N. W. 84.

²⁰ *Serle v. St. Eloy*, 2 P. Wms. 386.

²¹ 17 & 18 Vict. c. 113, § 1. See 1 N. Y. Rev. St. (1st Ed.) 749, pt. 2, c. 1, tit. 5, § 4.

²² *In re Doheny*, 171 N. Y. 691, 64 N. E. 1120.

²³ *In re Riegelman's Estate*, 174 Pa. 476, 34 Atl. 120.

²⁴ *Richardson v. Hall*, 124 Mass. 228; *Johnson v. Goss*, 125 Mass. 433.

REMEDIES OF CREDITORS AGAINST BENEFICIARIES

166. By statute, creditors whose claims have not been satisfied by the executor are frequently authorized to proceed against devisees and legatees who have received property under the will, and recover against them, to the extent of the value of the property thus received.

A will charging the testator's debts, on deficiency of personalty, on lands therein devised, does not impose any personal liability on the devisees, though they accept the provisions of the will,²⁵ unless the circumstances are such as fairly raise an implication of assumpsit.²⁶ However, the land itself might be reached in equity, in the hands of a devisee or of a purchaser with actual or constructive notice of the charge.²⁷ Statutes of the character indicated in the black-letter text have been widely adopted. They vary largely in their terms, and in the character of the remedies which they afford. Their discussion belongs to a work on the settlement of estates, as they present nothing peculiar to the law of wills.

CONTRIBUTION AMONG BENEFICIARIES FOR DEBTS PAID BY THEM

167. When the property bestowed by the will upon a beneficiary belonging to a class of beneficiaries, the subject-matter of whose gifts is equally liable to be applied to the payment of debts, has been taken for this purpose either in whole or in part, such beneficiary is entitled to a ratable contribution from the other beneficiaries of his class, whose property has not been so applied, and such is the case when a beneficiary pays the entire debt to prevent his property from being taken for that purpose.

This is but an instance of the application of the general equitable doctrine of contribution. Thus a devisee whose land is sold

²⁵ *Hayes v. Sykes*, 120 Ind. 180, 21 N. E. 1080.

²⁶ *Harland v. Person*, 93 Ala. 273, 9 South. 379 (devisees directed personally to pay debts); *Olmstead v. Brush*, 27 Conn. 530; *Burton Machinery Co. v. Davies*, 123 C. C. A. 373, 205 Fed. 141.

²⁷ *Brown v. Logan's Adm'r* (Ky.) 7 S. W. 398; *McKinley v. Coe*, 66 N. J. Eq. 70, 57 Atl. 1030.

by the executor to pay debts may demand contribution from other devisees,²⁸ and where the whole tax covering several parcels of land is paid by one devisee to prevent a sale of his parcel, he may recover from the others an equitable proportion of the tax.²⁹ So, where all the testator's property was specifically devised, the beneficiaries must contribute ratably to the payment of debts for which the testator had made no provision by reason of his erroneous belief that there were valid defenses to the claims.³⁰ And where a will directs that the testator's real estate shall be charged with the payment of his debts and subsequent to its execution he places an incumbrance upon part of the land devised, all the real estate, including the incumbered portion, must contribute to the payment of the incumbrance.³¹

²⁸ *Cox v. Johnson*, 242 Ill. 159, 89 N. E. 697.

²⁹ *McAdam v. Honey*, 20 R. I. 351, 39 Atl. 189.

³⁰ *In re Pittman's Estate*, 182 Pa. 355, 38 Atl. 133.

³¹ *Frasier v. Littleton's Ex'rs*, 100 Va. 9, 40 S. E. 103.

CHAPTER XXIII

ELECTION

- 168. Election Defined.
- 169. Necessity of Election.
- 170. Election—How Effected.
- 171-172. Time for Making Election.
- 173. Effect of Election.
- 174. Election by Persons under Disabilities.
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ELECTION DEFINED

168. Election is the obligation imposed on a party to choose between two inconsistent and alternative rights or claims in cases where there is a clear intention on the part of the person from whom he derives one that he should not enjoy both. The doctrine, which is purely equitable, finds its most frequent illustration in the case of wills.

The definition above is that generally given.¹ A common illustration occurs where one person undertakes to give to a third the property of another, and by the same instrument makes a gift to such other person. Here the latter cannot take the gift and retain his own property, but must elect to claim either under or against the instrument. Thus, where a wife inherited property which she allowed her husband to manage, and died intestate, leaving a daughter as her only heir, and her husband, by his will, disposed of this property belonging to his wife, which had descended to the daughter as her heir, and made provision from his own property for his daughter, the latter was put to her election either to renounce her interest under the will and assert her title to the property which she had inherited from her mother, or to take under the will and renounce her interest as heir in such property.²

¹ Eaton, Equity, 180; Story, Eq. Jur. § 1075.

² Drake v. Wild, 70 Vt. 52, 39 Atl. 248. Semble: Brown v. Brown, 42 Minn. 270, 44 N. W. 250.

NECESSITY OF ELECTION

169. To render an election necessary, there must appear in the will—

- (a) A clear intention on the part of the testator to dispose of property over whose disposition he has not, as against the party put to his election, the power of disposal;
- (b) A valid gift to such party of property absolutely and actually owned by the testator.

In order to put a party to his election under a will, it is necessary that the testator shall have given to another something that belongs to the party required to elect, and that he shall have given to the latter, directly, and not derivatively or indirectly, a substantial donation by the will.³ Thus, where land is devised to two daughters, with directions that they pay \$3,000 to a third, and, in default of such payments, 60 acres of the said land was devised to the third daughter, the two may either pay the \$3,000 and keep the whole land, or they may elect not to retain the 60 acres, and thus avoid paying the money.⁴ But where a father conveys to a daughter land which he had previously devised to a son, the daughter is not put to her election as to whether she will take the land under the deed, or her interest as given by the will.⁵

In determining the necessity of election, it is not material whether testator, in disposing of another's property, was in error as to his ownership, or whether he knew that he had no title thereto.⁶

The fact of the disposition by the testator of the property of another must be clearly shown. If the provisions of the will which is alleged to convey the property of another who is also a beneficiary, when taken in connection with the entire instrument, will reasonably admit a construction not involving such disposition, that construction will prevail, and the beneficiary will not be required to elect under the will or to claim the property.⁷ But the use of ex-

³ *Bennett v. Harper*, 36 W. Va. 546, 15 S. E. 143; *Moore v. Baker*, 4 Ind. App. 118, 30 N. E. 629, 51 Am. St. Rep. 203; *Jackson v. Bevins*, 74 Conn. 96, 49 Atl. 899; *Smith v. Smith*, 113 Md. 495, 77 Atl. 975, 31 L. R. A. (N. S.) 922, 140 Am. St. Rep. 435; *Bible v. Marshall*, 103 Tenn. 324, 52 S. W. 1077.

⁴ *Damuth v. Lee*, 29 App. Div. 26, 51 N. Y. Supp. 648. See, also, *Hyatt v. Vanneck*, 82 Md. 465, 33 Atl. 972.

⁵ *Hattersley v. Bissett*, 51 N. J. Eq. 597, 29 Atl. 187, 40 Am. St. Rep. 532. For further illustrations, see *Van Schaack v. Leonard*, 164 Ill. 602, 45 N. E. 982; *Hartwig v. Schiefer*, 147 Ind. 64, 46 N. E. 75.

⁶ *McDonald v. Shaw*, 92 Ark. 15, 121 S. W. 935, 28 L. R. A. (N. S.) 657.

⁷ *Charch v. Charch*, 57 Ohio St. 561, 49 N. E. 408; *Havens v. Sackett*, 15 N. Y. 365; *Rancliffe v. Parkyns*, 6 Dow. 149, 179.

press terms is not indispensable. If a reasonable and fair interpretation of the will discloses an intent to put the beneficiary to an election, it is enough.⁸ But words expressive of a mere wish, desire, or expectation that a beneficiary will dispose of property in a certain way are not sufficient.⁹

Disposition of Partial Interest

Where both the testator and beneficiary are interested in the property disposed of, the presumption is that the testator intended to give only that which was his, unless it clearly appear that he meant to dispose of the entire property.¹⁰ Thus, if the testator uses general expressions, such as "all my lands," "all my estate," no case of election arises, it not appearing that he meant to dispose of anything not strictly his own;¹¹ otherwise, where, owning merely a partial or individual interest, the testator devises the entire property, specifically describing it.¹²

Gift Necessary to Person Required to Elect

The doctrine of election depending upon compensation, it has no application unless the testator bestows property absolutely and actually his own upon the person required to elect.¹³ Thus, where a testator devises to one of his daughters land owned by the husband of another daughter, and then devises another tract to the last-named daughter, the husband cannot be required to elect, since nothing has been devised to him.¹⁴

The application of the doctrine is not affected by disproportion between the value of the property belonging to the beneficiary and that given him by the testator.¹⁵ And the doctrine applies to contingent as well as vested interests, and to reversions as well as to present interests.¹⁶

⁸ *Paulus v. Besch*, 127 Mo. App. 255, 104 S. W. 1149.

⁹ *Langslow v. Langslow*, 21 Beav. 552; *Blacket v. Lamb*, 14 Beav. 482.

¹⁰ *Eaton, Equity*, 186; *Toney v. Spragins*, 80 Ala. 541; *Havens v. Sackett*, 15 N. Y. 365; *Penn v. Guggenheimer*, 76 Va. 839; *Pickersgill v. Rodger*, 5 Ch. Div. 163; *Wilkinson v. Dent*, 6 Ch. App. 339.

¹¹ *La Tourette v. La Tourette* (1914) 15 Ariz. 200, 137 Pac. 426, Ann. Cas. 1915B, 70; *Sherman v. Lewis*, 44 Minn. 107, 46 N. W. 318; *Haack v. Welcken*, 118 N. Y. 67, 23 N. E. 133; *Winton v. Clifton*, 8 De G., M. & G. 641.

¹² *Waggoner v. Waggoner*, 111 Va. 325, 68 S. E. 990, 30 L. R. A. (N. S.) 644, and note; *Penn v. Guggenheimer*, 76 Va. 839 (devise of "home place," in which the testator owned only an undivided interest); *Shuttleworth v. Greaves*, 4 Myl. & C. 35.

¹³ *Eaton, Equity*, 189.

¹⁴ *Bennett v. Harper*, 36 W. Va. 546, 15 S. E. 143.

¹⁵ *Bigelow, Wills*, 346; *Lee v. Templeton*, 73 Ind. 315; *Caulfield v. Sullivan*, 85 N. Y. 153.

¹⁶ *Story, Eq. Jur.* § 1095.

Where the testator makes two distinct gifts of his own property to the same beneficiary—one beneficial and the other onerous—the beneficiary may accept the former and reject the latter,¹⁷ unless it clearly appears that the acceptance of the benefit is conditioned on the assumption of the burden.¹⁸ If the gift is single and undivided, the beneficiary must take all or none of it.¹⁹

ELECTION—HOW EFFECTED

170. An election may be either—

- (a) Express—by some positive declaration of the person required to elect, showing the intention and fact of election; or
- (b) Implied—from such acts of acceptance and acquiescence as evince an intention of the person required to elect to take one gift and reject the other.

No difficulty can arise in the case of an express election. The question as to whether there is an implied election is one of fact, turning upon the circumstances of each particular case. Election may be inferred from the conduct of the party, his acts, omissions, and method of dealing with the property,²⁰ but to constitute an implied election the acts or conduct relied upon must be of an unequivocal character.²¹ The taking and retention of property to which the taker has no right except under the will is an election of the benefit conferred by the will;²² and, in general, the enjoyment of the provisions of the will estops the beneficiary from exercising a further election.²³ So any assertion of title under the will, as by an action at law,²⁴ indicates an election to take thereunder, and an election against the interest conferred by the will may be indicated

¹⁷ *Syer v. Gladstone*, 30 Ch. Div. 614; *Moffett v. Bates*, 3 Sm. & G. 468.

¹⁸ *Green v. Britten*, 42 Law J. Ch. 187; *Talbot v. Earl of Radnor*, 3 Myl. & K. 252.

¹⁹ *Green v. Britten*, *supra*; *Guthrie v. Waldron*, 22 Ch. Div. 573; *In re Bloss' Estate*, 114 Mich. 204, 72 N. W. 148.

²⁰ *Eaton*, *Equity*, 195; *King v. Skellie*, 79 Ga. 147, 3 S. E. 614.

²¹ *Wolfe v. Mueller*, 46 Colo. 335, 104 Pac. 487; *Bebout v. Quick*, 81 Ohio St. 196, 90 N. E. 162.

²² *Crumpler v. Barfield & Wilson Co.*, 114 Ga. 570, 40 S. E. 808; *HOVEY v. HOVEY*, 61 N. H. 599, *Dunmore Cas. Wills*, 316; *Drake v. Wild*, 70 Vt. 52, 39 Atl. 248; *Lee v. McFarland*, 19 Tex. Civ. App. 292, 46 S. W. 281; *Fry v. Morrison*, 159 Ill. 244, 42 N. E. 774. When the party has a title to the land independent of the will, acts of ownership do not indicate an election. *Mellen v. Mellen*, 139 N. Y. 210, 34 N. E. 925.

²³ *Bennett v. Packer*, 70 Conn. 357, 39 Atl. 739, 66 Am. St. Rep. 112.

²⁴ *Davis v. Badlam*, 165 Mass. 248, 43 N. E. 91.

in like manner.²⁵ So, where the testator devised his homestead to his daughter on condition that she make it her home, otherwise to receive in lieu thereof a certain sum, her failure to make the homestead her home amounted to an election to take the money.²⁶ But in all cases, to constitute a binding election, the party must act or acquiesce with full knowledge of all his rights, and of all material facts which might influence or determine the manner in which they should be exercised.²⁷ Thus, where all the acts of a devisee tending to show an election to take under the will occur before she knows that she has any other title to the land, no election is implied.²⁸ So the execution of a mortgage by a beneficiary upon property bequeathed to him, and which he could not have taken except under the will, is no election to take thereunder when he was unaware that such an act amounted to an election, and when it was otherwise evident that he intended to assert his interest as against the will.²⁹ For any act, to be binding upon a person, must be done with the intention of constituting an election.³⁰

Whether the probating of a will and qualifying as executor constitute an election of benefits conferred upon him, so as to estop the executor from claiming any interest adverse to the will, is a matter of dispute. Where a testator, after making a will, gave a devisee who was named as executor a deed of the property devised to the latter, charged with the payment of a certain sum, the devisee, by qualifying as executor, was held to elect to take under the will, and the deed, therefore, was of no effect.³¹ But, according to the general rule, the mere probating of the will and qualification as executor do not per se constitute an election under the will, and the fact of an implied election must be determined by the facts and circumstances of each particular case.³²

²⁵ Thus where a sum of money is bequeathed to a nurse by the testator in payment for her care and attention to him, an action against the estate to recover the value of such services is an election not to claim the bequest. *Smith v. Furnish*, 70 Cal. 424, 12 Pac. 392.

²⁶ *Grindem v. Grindem*, 89 Iowa, 295, 56 N. W. 505.

²⁷ *Showalter v. Showalter*, 107 Va. 713, 60 S. E. 48; *Dillon v. Parker*, 1 Swanst. 381, 389; *Edwards v. Morgan*, 13 Price, 782; *Watson v. Watson*, 128 Mass. 152, 155.

²⁸ *Clark v. Hershy*, 52 Ark. 473, 12 S. W. 1077.

²⁹ *Williams v. Emberson*, 22 Tex. Civ. App. 522, 55 S. W. 595.

³⁰ *Cobb v. Macfarland*, 87 Neb. 408, 127 N. W. 377; *Waggoner v. Waggoner*, 111 Va. 325, 68 S. E. 990, 30 L. R. A. (N. S.) 644; *Stratford v. Powell*, 1 Ball & B. 1.

³¹ *Allen v. Allen*, 121 N. C. 328, 28 S. E. 513. See, also, *Treadaway v. Payne*, 127 N. C. 436, 37 S. E. 460; *Stone v. Vandermark*, 146 Ill. 312, 84 N. E. 150.

³² *Benedict v. Wilmarth*, 46 Fla. 535, 35 South. 84, 4 Ann. Cas. 1033, and

TIME FOR MAKING ELECTION

171. Aside from statute, and where the rights of third parties are not involved, there is no limit to the time within which an election may be made.
172. With reference to the rights of third parties, an election must be made within a reasonable time, if at all.

In the most usual instances of election—that of a spouse as between the provisions of the consort's will and the interest given by statute in the estate of the deceased—statutes have generally fixed the time within which election must be made;⁸³ otherwise, no more definite rule than that above stated can be given.⁸⁴ Where the testator gave certain land to his daughter so long as she should “desire to remain satisfied upon it,” it to revert “to the possession from which it was taken” in event of her dissatisfaction, the devisee was held to have a reasonable time in which to elect whether she desired to remain satisfied upon it.⁸⁵ Where a will provides that the testator's son shall have a home on a certain farm during his natural life, “if he shall so elect,” he is entitled to the benefit whenever he chooses to demand it.⁸⁶ And where a widow has for sixteen years received an income provided for her by the will of her husband, she cannot be then allowed to elect to take against the will, merely because she was not advised of the law regarding her rights.⁸⁷

EFFECT OF ELECTION

173. An election once made by a party bound to elect, acting with full knowledge of his rights and of all material circumstances, is irrevocable, and binds the party and his privies, and all beneficiaries under the will whose rights are directly affected by the election.

note; *Haby v. Fuos* (Tex. Civ. App.) 25 S. W. 1121; *In re Atkinson* [1898] 1 Ch. 637.

⁸³ The provisions as to time and manner of election vary largely. Equity will grant no relief where there was a failure to elect within the time fixed by statute by reason of the fact that the person entitled to elect was ignorant of the law. *Shelton v. Sears*, 187 Mass. 455, 73 N. E. 666.

⁸⁴ *Eaton*, Equity, 199.

⁸⁵ *Crumpler v. Barfield & Wilson Co.*, 114 Ga. 570, 40 S. E. 808.

⁸⁶ *Soper v. Halsey*, 85 Hun, 464, 33 N. Y. Supp. 105.

⁸⁷ *In re Bolleau's Estate*, 201 Pa. 493, 51 Atl. 338.

The above rule, which follows necessarily from the very nature of election, is supported by the authorities,³⁸ and its concrete illustrations are numerous. Thus, where land is devised, the devisee being directed to convey certain other land belonging to him to third parties, the devisee, by accepting the devise, elects to surrender all right to his own land, and must make the conveyance as indicated.³⁹ But an election induced by fraud may be set aside.⁴⁰

If the beneficiary elects to take against the will (i. e., to retain his own property instead of surrendering it to the third party and taking the testator's bounty), then the disappointed donee is compensated from the property designed for the electing beneficiary, to the extent that he has been injured by the beneficiary's declining to take thereunder, and the surplus, if any, does not devolve upon the heir as a residue undisposed of, but is restored to the electing beneficiary.⁴¹

ELECTION BY PERSONS UNDER DISABILITIES

174. Election may be enforced against married women, infants, and lunatics. In the case of infants and lunatics, the court will make the election in their behalf after ascertaining which course is the more advantageous. A married woman may elect for herself.

In the case of infants, the period of election may, under some circumstances, be deferred until they become of age.⁴² But ordinarily the court will institute an inquiry in behalf of the infant, and elect for him.⁴³

³⁸ *Earl of Northumberland v. Earl of Aylesford*, Amb. 540; *Dewar v. Maitland*, L. R. 2 Eq. 834; *Whitley v. Whitley*, 81 Beav. 173; *Cory's Ex'r v. Cory's Adm'r*, 37 N. J. Eq. 198; 2 Pom. Eq. Jur. § 517; *Helm v. Leggett*, 66 Ark. 23, 48 S. W. 675. See, also, *Weller v. Noffsinger*, 57 Neb. 455, 77 N. W. 1075; *Gorham v. Dodge*, 122 Ill. 528, 14 N. E. 44; *Bird v. Hawkins*, 58 N. J. Eq. 229, 42 Atl. 588; *Pryor v. Pendleton*, 92 Tex. 384, 47 S. W. 706, 49 S. W. 212; *Borden v. Ward*, 103 N. C. 173, 9 S. E. 300; *Hartwig v. Schiefer*, 147 Ind. 64, 46 N. E. 75; *Cooke v. Safety Vault Co.*, 104 Ky. 473, 47 S. W. 325.

³⁹ *McQuerry v. Gilliland*, 89 Ky. 434, 12 S. W. 1037, 7 L. R. A. 454.

⁴⁰ *Whitesell v. Strickler*, 167 Ind. 602, 78 N. E. 845, 119 Am. St. Rep. 524.

⁴¹ *In re Delaney's Estate*, 49 Cal. 77; *Carper v. Crowl*, 149 Ill. 465, 36 N. E. 1040; *Wilbanks v. Wilbanks*, 18 Ill. 17; *Brown v. Brown*, 42 Minn. 270, 44 N. W. 250; *Roe's Ex'rs v. Roe*, 21 N. J. Eq. 253; *Appeal of Van Dyke*, 60 Pa. 481, 490; *Appeal of Sandoe*, 65 Pa. 314; *Streatfield v. Streatfield*, Cas. temp. Talb. 176; *Gretton v. Haward*, 1 Swanst. 433; *Rogers v. Jones*, 3 Ch. Div. 688.

⁴² *Streatfield v. Streatfield*, Cas. temp. Talb. 176; *Eaton, Equity*, 198.

⁴³ *McQueen v. McQueen*, 55 N. C. 16, 62 Am. Dec. 205; *Bonnie's Guardian*

The committee of a lunatic cannot elect in his behalf, but must apply to the court for leave to that end, which will not be granted except upon due consideration of the advantages and disadvantages resulting to the lunatic from the choice, and this will be made under the direction of the court.⁴⁴ The guardian of an insane person may elect only with the approval of the court having jurisdiction of the ward.⁴⁵

Where the common-law disabilities of married women have been removed by statute, there is, of course, no question as to their power to elect. And independent of statute they may apparently elect so as to affect their interests in both real and personal property.⁴⁶

ELECTION BY SURVIVING SPOUSE

175. The foregoing doctrines find their most frequent illustration in case of election by a surviving spouse. If the will declares in express terms or by unavoidable implication that a testamentary gift is in lieu of dower, the widow is put to her election. In the absence of such express or implied declaration, a provision for the wife in a will is presumed to be in addition to her dower right, and no election is required.
176. By statute, in a number of states, this rule has been changed so that a provision for the wife in a will is presumed to be in lieu of dower, in the absence of a manifest intent to the contrary, in which case election by the widow is necessary.
177. These principles generally apply to provisions made by the will of a wife for her husband.

The common-law rule is as above stated.⁴⁷ If the gift is not declared by express words to be in lieu of dower, the inquiry is wheth-

v. Haldeman, 31 Ky. Law Rep. 522, 102 S. W. 308; *Brown v. Brown*, L. R. 2 Eq. 481; *Ebrington v. Ebrington*, 5 Madd. 117.

⁴⁴ *State ex rel. Percy v. Hunt* (1903) 88 Minn. 404, 93 N. W. 314; *State v. Ueland*, 30 Minn. 277, 15 N. W. 245; *Penhallow v. Kimball*, 61 N. H. 596; *Kennedy v. Johnston*, 65 Pa. 451, 3 Am. Rep. 650; *Van Steenwyck v. Washburn*, 59 Wis. 483, 509, 17 N. W. 289, 48 Am. Rep. 532.

⁴⁵ *Hardy v. Richards* (1911) 98 Miss. 625, 54 South. 76, 35 L. R. A. (N. S.) 1210 and note. See, also, *In re Connor's Estate*, 254 Mo. 65, 162 S. W. 252, 49 L. R. A. (N. S.) 1108.

⁴⁶ *McQueen v. McQueen*, 55 N. C. 16, 62 Am. Dec. 205; *Robinson v. Buck*, 71 Pa. 386; *Tiernan v. Roland*, 15 Pa. 430, 452.

⁴⁷ *Beard v. Knox*, 5 Cal. 252, 63 Am. Dec. 125; *Lord v. Lord*, 23 Conn. 327; *Kinsey v. Woodward*, 3 Har. (Del.) 459; *Speer v. Speer*, 67 Ga. 748; *Kiefer*

er-such an intention on the part of the testator is to be collected by clear and manifest implication from the will.⁴⁸ To give rise to such an implication, the claim of dower must be inconsistent with the will, and repugnant to some of its dispositions.⁴⁹ Adequacy of the testamentary provision as compared with the value of the dower interest is not controlling on the question of intention,⁵⁰ though inadequacy of such provision, if known to the testator, strongly indicates that it was not the testator's intention to put his widow to her election.⁵¹

Ascertainment of Values by Widow

The widow is entitled to ascertain the value of her dower interest and that conferred upon her by the will, and to this end may maintain a bill in equity to learn the extent of the respective interests.⁵² No act of election is binding upon her, unless done with full knowledge of all the circumstances, and of her rights, and with the intention of electing.⁵³ Thus, in the absence of such information regarding her husband's indebtedness, the receipt by her of certain personalty of an estate cannot be treated as an election to take under the will which gives her all the personalty absolutely.⁵⁴ In general, her election, made without full knowledge or under a mistake of fact as to the value and condition of the property, may be revoked,⁵⁵

v. Gillett (1903) 120 Iowa, 107, 94 N. W. 270; *Watson v. Watson*, 98 Iowa, 132, 67 N. W. 83; *Sutherland v. Sutherland*, 102 Iowa, 535, 71 N. W. 424, 63 Am. St. Rep. 477; *Franke v. Wiegand*, 97 Iowa, 704, 66 N. W. 918; *In re Proctor's Estate*, 103 Iowa, 232, 72 N. W. 516; *Horstmann v. Flege*, 61 App. Div. 518, 70 N. Y. Supp. 596; *Closs v. Eldert*, 30 App. Div. 338, 51 N. Y. Supp. 881; *Hiers v. Gooding*, 43 S. C. 428, 21 S. E. 310; *In re Hatch's Estate*, 62 Vt. 300, 18 Atl. 814, 22 Am. St. Rep. 109; *Dixon v. McCue*, 14 Grat. (Va.) 540; *Atkinson v. Sutton*, 23 W. Va. 197.

⁴⁸ *Eaton, Equity*, 191.

⁴⁹ *Adsit v. Adsit*, 2 Johns. Ch. (N. Y.) 448, 7 Am. Dec. 539; *Konvalinka v. Schlegel*, 104 N. Y. 125, 9 N. E. 868, 58 Am. Rep. 494; *Scott v. Vaughn*, 83 S. C. 362, 65 S. E. 269; *Callahan v. Robinson*, 30 S. C. 249, 9 S. E. 120, 3 L. R. A. 497, and note; *Reed v. Dickerman*, 12 Pick. (Mass.) 146; *In re Purcell*, 25 R. I. 553, 57 Atl. 377.

⁵⁰ *Lewis v. Smith*, 9 N. Y. 502, 61 Am. Dec. 706.

⁵¹ *Atkinson v. Sutton*, 23 W. Va. 197; *Tracey v. Shumate*, 22 W. Va. 474.

⁵² *Johnston v. Duncan*, 67 Ga. 61; *United States v. Duncan*, 4 McLean, 99, Fed. Cas. No. 15,002.

⁵³ *Hodgkins v. Ashby*, 56 Colo. 553, 139 Pac. 538; *Stone v. Vandermark*, 146 Ill. 312, 34 N. E. 150; *Reaves v. Garrett's Adm'r*, 34 Ala. 558; *English v. English's Ex'rs*, 3 N. J. Eq. 504, 29 Am. Dec. 730; *Payton v. Bowen*, 14 R. I. 375.

⁵⁴ *Geiger v. Geiger*, 57 S. C. 521, 35 S. E. 1031.

⁵⁵ *In re Smith's Estate*, 108 Cal. 115, 40 Pac. 1037; *Garn v. Garn*, 135 Ind. 687, 35 N. E. 394; *In re Woodburn's Estate*, 138 Pa. 606, 21 Atl. 16, 21 Am. St. Rep. 932; *Pratt v. Douglas*, 38 N. J. Eq. 539; *Dabney v. Bailey*, 42 Ga. 521.

and this is true though she make a sealed agreement with the executor to abide by her husband's will.⁵⁶

Where the widow made her election under a mistake as to her rights under the will, a revocation was allowed in equity, where the rights of other parties were not thereby prejudiced,⁵⁷ and where an election was made by the widow under a misapprehension of the law as to her dower rights, caused by the erroneous advice of her counsel, she was permitted to retract her election.⁵⁸ She cannot, however, treat her election as void, and yet retain what she received in consequence of it.⁵⁹

Acts of Widow Amounting to an Election

The principles heretofore discussed⁶⁰ apply here. Conduct, as well as matters of record, may constitute an election,⁶¹ such as the receipt of property bestowed on her by the will,⁶² the entry into possession of devised lands and the sale thereof,⁶³ or possession alone,⁶⁴ or the unequivocal assumption of ownership of one of the two properties between which she has the right to choose,⁶⁵ or an application to have certain property coming to her under the will set apart to her.⁶⁶ The proof of an implied election must, however, be clear and satisfactory.⁶⁷ No election results from the probating of the will by the widow who qualifies as executrix thereunder and

⁵⁶ *Richardson v. Justice*, 125 N. C. 409, 34 S. E. 441.

⁵⁷ *Macknet v. Macknet*, 29 N. J. Eq. 54.

⁵⁸ *In re McFarlin* (1910) 9 Del. Ch. 430, 75 Atl. 281.

⁵⁹ *Steele v. Steele's Adm'r*, 64 Ala. 438, 38 Am. Rep. 15; *In re Young's Estate*, 202 Pa. 431, 51 Atl. 1036.

⁶⁰ *Ante*, p. 539.

⁶¹ *Reville v. Dubach*, 60 Kan. 572, 57 Pac. 522; *Owens v. Andrews* (1913) 17 N. M. 597, 131 Pac. 1004, 49 L. R. A. (N. S.) 1072.

⁶² *Id.*; *Skaggs v. Deskin* (Tex. Civ. App.) 66 S. W. 793; *Hill v. Hill*, 62 N. J. Law, 442, 41 Atl. 943; *MOORE v. BAKER*, 4 Ind. App. 115, 30 N. E. 629, 51 Am. St. Rep. 203, *Dunmore Cas. Wills*, 314; *In re Franke's Estate*, 97 Iowa, 704, 66 N. W. 918; *Gilroy v. Richards*, 26 Tex. Civ. App. 355, 63 S. W. 664.

⁶³ *In re Smith's Estate*, 4 Cal. Unrep. Cas. 919, 38 Pac. 950; *Whetsell v. Loudon*, 25 Ind. App. 257, 57 N. E. 952; *Chace v. Gregg*, 88 Tex. 552, 32 S. W. 520; *Larkin v. McManus*, 81 Iowa, 723, 45 N. W. 1061.

⁶⁴ *Wilson v. Wilson*, 145 Ind. 659, 44 N. E. 665; *Cook v. Lawson*, 63 Kan. 854, 66 Pac. 1028; *Hoggard v. Jordan*, 140 N. C. 610, 53 S. E. 220, 4 L. R. A. (N. S.) 1065, 6 Ann. Cas. 332. Possession may, however, be explained so as to remove the presumption of election. *Wold v. Berkholtz*, 105 Iowa, 370, 75 N. W. 329.

⁶⁵ *Burroughs v. De Couts*, 70 Cal. 361, 11 Pac. 734.

⁶⁶ *Smith v. Butler*, 85 Tex. 126, 19 S. W. 1083. *Semble*: *Schweitzer v. Bonn's Ex'rs* (N. J. Ch.) 38 Atl. 302.

⁶⁷ *Reville v. Dubach*, 60 Kan. 572, 57 Pac. 522. See, also, *O'Brien v. Knotts*, 165 Ind. 308, 75 N. E. 594.

takes possession of the estate,⁶⁸ nor by an occupancy which might as well have been against as under the will,⁶⁹ nor by an oral consent to the will, given when it was made,⁷⁰ nor by the receipt of support not provided for by the will.⁷¹ Election is effected by filing a petition for dower within the proper time,⁷² by renouncing by deed the provision of the will and claiming dower,⁷³ and by giving written notice to the executors of her intention in the matter.⁷⁴

Widow's Right to Elect a Personal Right

The widow's right of election is purely personal, and in event of her death it cannot be exercised in behalf of her estate by her personal representatives⁷⁵ or heirs,⁷⁶ even though she be personally incapable of making a choice by reason of continuous insanity from the time of the testator's death.⁷⁷ The personal representative cannot have an election set aside because made by his decedent under a mistake as to her legal rights,⁷⁸ but he may question the validity of an attempted election.⁷⁹ Equity will not compel a widow to exercise her election for the benefit of her creditors.⁸⁰ In event of no election by the widow, she is ordinarily, by statute, presumed to take under the will.⁸¹

⁶⁸ In re Gwin's Estate, 77 Cal. 313, 19 Pac. 527; Benedict v. Wilmarth, 46 Fla. 535, 35 South. 84, 4 Ann. Cas. 1033; In re Proctor's Estate, 103 Iowa, 232, 72 N. W. 516; McClary v. Duckworth (Tex. Civ. App.) 57 S. W. 317. Contra: Mendenhall v. Mendenhall, 53 N. C. 287.

⁶⁹ Archer v. Barnes (1910) 149 Iowa, 658, 128 N. W. 969; Hunter v. Hunter, 95 Iowa, 728, 64 N. W. 656, 58 Am. St. Rep. 455.

⁷⁰ Cook v. Lawson, 63 Kan. 854, 66 Pac. 1028. The fact of such consent is, however, admissible as tending to show her subsequent attitude of mind towards the will. Id.

⁷¹ In re Blackmer's Estate, 66 Vt. 46, 28 Atl. 419.

⁷² Rayner v. Capehart, 9 N. C. 375.

⁷³ Hawley v. James, 5 Paige (N. Y.) 318, 435.

⁷⁴ Greiner's Appeal, 103 Pa. 89.

⁷⁵ NORDQUIST'S ESTATE v. SAHLBORN, 114 Minn. 329, 131 N. W. 323, Dunmore Cas. Wills, 317; Williamson v. Nelson (Tenn. Ch. App.) 62 S. W. 53; In re McClintock's Estate, 240 Pa. 543, 87 Atl. 703; In re Anderson's Estate, 185 Pa. 174, 39 Atl. 818.

⁷⁶ Page v. Public Library, 69 N. H. 575, 45 Atl. 411; In re Anderson's Estate, 185 Pa. 174, 39 Atl. 818.

⁷⁷ Williamson v. Nelson (Tenn. Ch. App.) 62 S. W. 53.

⁷⁸ Fergus v. Schiable (1912) 91 Neb. 180, 135 N. W. 448.

⁷⁹ Miller v. Stephens, 158 Ind. 438, 63 N. E. 847.

⁸⁰ Bains v. Globe Bank & Trust Co. (1910) 136 Ky. 332, 124 S. W. 343, 136 Am. St. Rep. 263.

⁸¹ Appeal of Jackson, 126 Pa. 105, 17 Atl. 535; Archibald v. Long, 144 Ind. 451, 43 N. E. 439; Koster v. Gellen, 124 Mich. 149, 82 N. W. 823.

Effect of Widow's Election

A widow who elects to accept benefits under a will in lieu of dower must conform to all its provisions, and renounce every right inconsistent therewith.⁸² Thus a widow who elects to take under her husband's will is barred of dower in lands conveyed by him during coverture by a deed of warranty in which she did not join.⁸³ She does not become, however, strictly a partaker of the testator's bounty, but is treated in equity as a purchaser for value, in view of the dower rights which have been barred by her election.⁸⁴ Hence, when part of the legacy so bequeathed is taken for the payment of debts, she is entitled to reimbursement from the balance of the estate.⁸⁵ By the weight of authority she can take nothing until the debts of the testator are paid,⁸⁶ though, in view of the fact that by analogy she takes under a contract with the testator, some courts have held that she shares on an equality with the creditors if the estate is insufficient to pay the debts and her legacy.⁸⁷ Electing to take under the will, she can claim neither homestead nor dower as against the testator's creditors.⁸⁸ But a widow taking under the will is not deprived of her statutory allowance for support, unless the testamentary provisions are, in terms, expressly or impliedly inconsistent with the granting of such allowance.⁸⁹

In some jurisdictions, where a widow elects to take under the will, she thereby loses all interest in property in regard to which the testator died intestate, as well as in that upon which the will operates other than that given her in lieu of dower.⁹⁰ In other jurisdictions, however, the courts permit the widow to take her share

⁸² *Godman v. Converse*, 43 Neb. 463, 61 N. W. 756; *Kirkpatrick v. Kirkpatrick*, 197 Ill. 144, 64 N. E. 267; *Kidder v. Douglas*, 194 Ill. 388, 62 N. E. 911.

⁸³ *Howe Lumber Co. v. Parker*, 105 Minn. 310, 117 N. W. 518.

⁸⁴ *Richie v. Cox*, 99 Ill. App. 369; *Isenhardt v. Brown*, 1 Edw. Ch. (N. Y.) 411, 413.

⁸⁵ *Overton v. Lea*, 108 Tenn. 505, 68 S. W. 250.

⁸⁶ *Steele v. Steele's Adm'r*, 64 Ala. 438, 38 Am. Rep. 15; *Howard v. Francis*, 30 N. J. Eq. 444; *Chambers v. Davis*, 15 B. Mon. (Ky.) 522; *Arrington v. Dortch*, 77 N. C. 367; *Miller v. Buell*, 92 Ind. 482; 1 Woerner, Am. Law of Administration, 272.

⁸⁷ *Tracy v. Murray*, 44 Mich. 109, 6 N. W. 224.

⁸⁸ *Kiesewetter v. Kress* (Ky.) 70 S. W. 1065; *Harrison v. Taylor's Adm'r* (Ky.) 51 S. W. 193.

⁸⁹ *In re Cowell's Estate*, 164 Cal. 636, 130 Pac. 209; *Bowman v. Olrick*, 165 Ind. 478, 75 N. E. 820.

⁹⁰ *Walker v. Upson*, 74 Conn. 128, 49 Atl. 904; *In re Hodgman's Estate*, 140 N. Y. 421, 35 N. E. 660; *Appeal of Jackson*, 126 Pa. 105, 17 Atl. 535; *Chapman v. Chapman*, 128 Wis. 413, 107 N. W. 668.

of intestate property, though she has elected to take under the will.⁹¹

If a will is void because of its provisions as to the testator's widow, it is not rendered valid by her election to take under the law.⁹² Where a will directs the conversion of real into personal property, and the widow elects to take under the statute, her rights are then fixed irrespective of the will, and she cannot claim that the conversion operates in her favor so as to enable her to take one-half of the fund absolutely, as personalty.⁹³ In event of her renouncing the will, her interest cannot be diminished by reason of costs incurred in litigation over its probate and construction.⁹⁴

When the widow elects to take under the law, the will, so far as may be, remains effective and will be administered.⁹⁵ Where such election results to the disadvantage of other beneficiaries, as is usually the case, such beneficiaries are to be compensated out of the subject-matter of the gift to the widow in the will,⁹⁶ or, if this be impossible, out of the residuary estate.⁹⁷ If the renunciation of the will results in partial intestacy, the widow may share in the property undisposed of as heir or distributee, if she be either under the statutes of descent or distribution.⁹⁸

When a provision is made by will for the wife for life, with remainder over, and she elects to take under the law, the remainder is ordinarily accelerated, and the remaindermen take at once.⁹⁹ But where the claim for dower is satisfied out of land devised to

⁹¹ *Sutton v. Read*, 176 Ill. 69, 51 N. E. 801; *Nickerson v. Bowly*, 49 Mass. (8 Metc.) 424; *Skellenger v. Skellenger*, 32 N. J. Eq. 659; *State v. Holmes*, 115 Mich. 458, 73 N. W. 548; *Mathews v. Krisher*, 59 Ohio St. 562, 53 N. E. 52.

This position seems preferable. The statute having appointed a definite channel of disposition of all intestate property, the widow takes by operation of law irrespective of any act or will of decedent.

⁹² *Dean v. Mumford*, 102 Mich. 510, 61 N. W. 7.

⁹³ *In re Cunningham's Estate*, 137 Pa. 621, 20 Atl. 714, 21 Am. St. Rep. 901.

⁹⁴ *Morton's Ex'rs v. Morton's Ex'r*, 112 Ky. 706, 66 S. W. 641.

⁹⁵ *Pittman v. Pittman*, 81 Kan. 643, 107 Pac. 235, 27 L. R. A. (N. S.) 602, and note; *In re Little*, 22 Utah, 204, 61 Pac. 899.

Thus a testamentary provision for the funeral expenses and the erection of a monument for the widow of the testator on her death is not abrogated by her waiver of the provisions of the will and her election to take dower. *Leonard v. Haworth*, 171 Mass. 496, 51 N. E. 7.

⁹⁶ *Dean v. Hart*, 62 Ala. 308; *Jennings v. Jennings*, 21 Ohio St. 56; *In re Evan's Estate*, 150 Pa. 212, 24 Atl. 642; *Jones v. Knappen*, 63 Vt. 391, 22 Atl. 630, 14 L. R. A. 293.

⁹⁷ *Treasy v. Treasy* (Ky.) 36 S. W. 3; *Chamberlain v. Berry's Ex'r* (Ky.) 56 S. W. 659; *Tehan v. Tehan*, 83 Hun, 368, 31 N. Y. Supp. 961.

⁹⁸ *In re Kempton*, 23 Pick. (Mass.) 163.

⁹⁹ *Beidman v. Sparks*, 61 N. J. Eq. 226, 47 Atl. 811; *Baptist Female University of North Carolina v. Borden* (1903) 132 N. C. 476, 44 S. E. 47, 1007.

another beneficiary, and there was no personalty to which the latter could have recourse for satisfaction, the remainder was not accelerated, but the disappointed beneficiary was subrogated to the rights of the widow under the will, and took the life estate devised to her.¹

Where a will gives the wife both real and personal property, she must either take under or against the will as a unit; she cannot elect to take under the will as to the realty, and under the statute as to the personalty.² And a widow who has elected to take under the will at testator's domicile cannot elect to take under the law in another jurisdiction where testator left property.³

Election by Surviving Husband

Generally, the same principles apply to election by the surviving husband between the interest given him under the will and by law in the property of his wife as prevail in election by the widow under similar circumstances.⁴ The contest by him of his wife's will is not a renunciation of a devise therein to him.⁵

¹ *Latta v. Brown*, 96 Tenn. 343, 34 S. W. 417, 31 L. R. A. 840.

² *In re Bloss' Estate*, 114 Mich. 204, 72 N. W. 148.

³ *Martin v. Battey*, 87 Kan. 582, 125 Pac. 88, Ann. Cas. 1914A, 440; *Lindsley v. Patterson* (Mo. 1915) 177 S. W. 826, L. R. A. 1915F, 680.

⁴ *Eyerett v. Croskrey*, 92 Iowa, 333, 60 N. W. 732; *Gillespie v. Boisseau* (Ky.) 64 S. W. 730; *Clark v. Clark*, 132 Ind. 25, 31 N. E. 461; *Lahr v. Ulmer*, 27 Ind. App. 107, 60 N. E. 1009.

With regard to acts of acceptance, see *Richardson v. Trubey*, 250 Ill. 577, 95 N. E. 971; *Hawkins v. Bohling*, 168 Ill. 214, 48 N. E. 94; *Milner v. Davis* (1903) 120 Iowa, 231, 94 N. W. 511; *Brightman v. Morgan*, 111 Iowa, 481, 82 N. W. 954; *McGrath v. Quinn*, 218 Mass. 27, 105 N. E. 555 (consent to probate); *Allen v. Boomer*, 82 Wis. 364, 52 N. W. 426; *Rowley v. Sanns*, 141 Ind. 179, 40 N. E. 674.

As to the effect of acting as executor, see *Appeal of Coe*, 64 Conn. 352, 30 Atl. 140; *Appeal of Scholl* (Pa.) 17 Atl. 206; *Kerrigan v. Conelly* (N. J. Ch.) 46 Atl. 227.

⁵ *Scheible v. Rinck*, 195 Ill. 636, 63 N. E. 497.

CHAPTER XXIV

RIGHTS OF BENEFICIARIES NOT PREVIOUSLY DISCUSSED.

- 178-179. Title to Subject-Matter of Devise or Bequest.
- 180. Right of Devisee or Legatee to Possession.
- 181-182. Time for Payment of Legacies.
- 183-184. Interest on Legacies.
- 185. Transfers by Legatees and Devisees.
- 186. Effect of a Legacy Given by Creditor to Debtor.
- 187-188. Estoppel of Beneficiaries to Contest the Will.

TITLE TO SUBJECT-MATTER OF DEVISE OR BEQUEST

- 178. The title to personal property of every kind upon which the will operates at all goes immediately to the executor.
- 179. The title to real estate which the will undertakes to dispose of passes directly to the beneficiaries, without the intervention of the executor, unless there is provision in the will or by statute to the contrary.

With regard to realty, the will operates as a conveyance, and where the gift is outright the devisee takes title at the testator's death,¹ if the will is duly admitted to probate.² The devisee stands substantially in the shoes of the testator, and takes subject to rights created by contracts of the testator affecting the title of or relating to the land.³ The question as to whether a devisee takes title immediately depends, of course, wholly upon the language of the will, and an allegation that the complainants are "devisees under the last will," etc., is not a sufficient assertion of title in a bill in equity seeking relief on the ground of title in the complainants to certain land devised.⁴ For the will may provide for the vesting

¹ *Croswell's Executors and Adm'rs*, 207; *Jenks v. Liverpool, London & Globe Ins. Co.*, 203 Mass. 591, 92 N. E. 998; *Satcher v. Grice*, 53 S. C. 126, 31 S. E. 3; *English-McCaffery Logging Co. v. Clowe*, 29 Wash. 721, 70 Pac. 138; *Simmons v. Spratt*, 26 Fla. 449, 8 South. 123, 9 L. R. A. 343; *Flemister v. Flemister*, 83 Ga. 79, 9 S. E. 724; *Hall v. Hall*, 98 Wis. 193, 73 N. W. 1000.

² *Evansville Ice & Cold Storage Co. v. Winsor*, 148 Ind. 682, 48 N. E. 592. Devisees cannot enjoin real actions by the heirs at law until probate of the will. *Pratt v. Hargreaves*, 76 Miss. 955, 25 South. 658, 71 Am. St. Rep. 551.

³ *Hyde v. Heller*, 10 Wash. 586, 39 Pac. 249.

⁴ *Brown v. Tallman* (N. J. Ch. 1903) 54 Atl. 457.

of the title at a time subsequent to the testator's death,⁶ or that it may, for certain purposes, vest in the executors.⁶

By statute, in a number of jurisdictions, the real estate of the decedent is made a part of his estate, and the executor has a title either in fee or during administration, or a possessory right to occupy and take the rents and profits for the settlement of the estate.⁷

With regard to personality, however, the executor represents the testator, "a legal or fictitious as distinguished from a natural or true personality being assumed to exist in the executor and to continue until the duties committed to him have been performed. The legatee takes accordingly from a representative."⁸ In other words, title comes to the legatee through the executor, and administration is necessary to perfect his title.⁹

RIGHT OF DEVISEE OR LEGATEE TO POSSESSION

180. It follows that, in the absence of a statute giving the right of possession to the executor, a devisee to whom land is given outright is entitled to possession on the death of the testator, if the testator had that right. The same rule applies to specific legatees unless the subject-matter of the legacy is needed to satisfy debts. Debts paid, the right to possession depends wholly upon the intention of the testator as disclosed by the will.

This proposition follows necessarily from that of the preceding black-letter text. The devisee, after probate of the will, may maintain suit against the party in possession for the recovery of the land, and if such party be a legatee whose legacy is a charge upon the land recovery of the land will not be defeated by showing nonpayment of the legacy.¹⁰ A legatee of specific property is entitled to

⁶ *Henry v. Henderson* (1903) 81 Miss. 743, 33 South. 960, 63 L. R. A. 616.

⁶ *Beadle v. Beadle* (C. C.) 40 Fed. 315; *Traphagen v. Levy*, 45 N. J. Eq. 448, 18 Atl. 222.

⁷ *Croswell's Executors, etc.*, 208; *Banks v. Speers*, 97 Ala. 560, 11 South. 841; *Dexter v. Hayes*, 88 Iowa, 493, 55 N. W. 491; *Grady v. Warrell*, 105 Mich. 310, 63 N. W. 204.

⁸ *Bigelow, Wills*, 19. See, also, *Croswell's Executors, etc.*, 207; *Tourtlot v. Flnke* (C. C.) 87 Fed. 840.

⁹ *Bauernschmidt v. Bauernschmidt* (1903) 97 Md. 35, 54 Atl. 637. See *Rhodes v. Rhodes*, 88 Tenn. 637, 13 S. W. 590. This topic properly belongs to the subject of Executors and the Settlement of Estates, and will not be pursued further here. See 1 *Woerner, Am. Law of Administration*, 592 et seq.

¹⁰ *Dinan v. Coneys*, 143 N. Y. 544, 38 N. E. 715.

possession on the death of the testator, unless it be needed to pay debts.¹¹ Debts paid, the legatee of a life interest in personal property, with remainder over, is entitled to possession if an intention to that end appear, though the bequest is general.¹² Such intent may be express, as where the taker for life is in terms given the custody of the property,¹³ or where the property is given to hold and enjoy for life,¹⁴ or implied, as where property is left to one for life with unlimited discretion as to its use,¹⁵ or to one for life with remainder over of so much of the property as remains unconsumed.¹⁶ But where money or other personal property yielding an income is bequeathed for life generally, and no trustee is appointed, the executor will hold the property, properly invested, and pay the interest only to the person entitled for life.¹⁷ But where a life interest in a chattel, such as a table or picture, is bequeathed, possession must be given to the beneficiary.¹⁸

TIME FOR PAYMENT OF LEGACIES

181. The testator may determine the time at which legacies shall be paid, and his intention controls.

182. If no time of payment is indicated by the will, legacies are payable at the expiration of one year from the testator's death, unless the time of payment under such circumstances is fixed otherwise by statute.

The testator may fix the time at or within which a legacy shall be paid, as within sixty days after his death,¹⁹ or at any other indicated time, and such restrictions in regard to the time are valid

¹¹ In re Robinson's Estate, 24 Pa. Co. Ct. R. 588.

¹² Hill v. Harding, 92 Ky. 76, 17 S. W. 199, 437.

¹³ Gee v. Hasbrouck, 128 Mich. 509, 87 N. W. 621; In re Ungrich, 166 N. Y. 618, 59 N. E. 1131.

¹⁴ In re Garrity's Estate, 108 Cal. 463, 38 Pac. 623, 41 Pac. 485; In re McDougall, 141 N. Y. 21, 35 N. E. 961.

¹⁵ Pierce v. Stidworthy, 81 Me. 50, 16 Atl. 333.

¹⁶ Posegate v. South, 46 Ohio St. 391, 21 N. E. 641. Semble: Colliver v. Taylor (Ky.) 51 S. W. 432.

¹⁷ Eddy v. Cross, 26 Ind. App. 643, 60 N. E. 470; White v. Institute, 171 Mass. 84, 50 N. E. 512. Semble: Lewis v. Shattuck, 173 Mass. 486, 53 N. E. 912.

¹⁸ White v. Institute, supra; WHITTEMORE v. RUSSELL, 80 Me. 297, 14 Atl. 197, 6 Am. St. Rep. 200, Dunmore Cas. Wills, 257; Fuller v. Fuller, 84 Me. 475, 24 Atl. 946.

¹⁹ Martin v. Martin, 69 Miss. 315, 13 South. 267. Semble: Cowherd v. Kitchen, 57 Neb. 426, 77 N. W. 1107.

if they do not offend the rule against perpetuities.²⁰ Legacies may be made payable when the legatee reaches a certain age,²¹ or when one of a class reaches a certain age.²²

Where a legatee, who takes a legacy payable when she reaches the age of twenty-one, dies after the death of the testator, but before becoming of age, the legacy is at once payable to her personal representatives,²³ unless the interest on the sum is given to others during minority, in which case it seems that payment of the principal will not be made until such time as the legatee would have reached the age of twenty-one.²⁴

Where a legacy is given to take effect at the termination of a preceding life estate or at the death of the taker for life, and it is evidently the testator's intent that, upon the failure of the life estate for any reason, the legacy over is to at once take effect, the failure of the life interest will accelerate the enjoyment of the remainder, and the legacy is then payable immediately on the termination of the life estate. This rule is most frequently applied where a widow elects to take under the law instead of a life interest provided for her in lieu of dower under the will.²⁵ But where the fund is in terms to be paid at the death of the wife, who is given the enjoyment thereof for life, the failure of her life interest by virtue of her election to take against the will does not accelerate the remainder, and there can be no distribution of the fund until the time fixed by the will therefor, viz., her death.²⁶

If the will mentions no time for the payment of legacies, the

²⁰ *Clafin v. Clafin*, 149 Mass. 19, 20 N. E. 454, 3 L. R. A. 370, 14 Am. St. Rep. 393 (where a fund was to be paid in installments as the legatee should reach the ages of 21, 25, and 30 years); *Derbyshire's Estate*, 239 Pa. 389, 86 Atl. 878.

²¹ *Turner v. Safety Vault Co. (Ky.)* 49 S. W. 9; *Bunch v. Ray (Ky.)* 49 S. W. 336; *Calvert v. Boullemet*, 46 La. Ann. 1132, 15 South. 363; *Stehlin v. Stehlin*, 67 Hun, 110, 22 N. Y. Supp. 40; *Collin v. Wilcox*, 65 Hun, 368, 20 N. Y. Supp. 199.

²² *Webber v. Jones*, 94 Me. 429, 47 Atl. 903.

²³ *Savin v. Webb*, 96 Md. 504, 54 Atl. 64; *McReynolds v. Graham (Tenn. Ch. App.)* 43 S. W. 138.

²⁴ *Merritt v. Richardson*, 14 Allen (Mass.) 239, 241.

²⁵ *Slocum v. Hagaman*, 176 Ill. 533, 52 N. E. 332; *Trustees Church Home v. Morris*, 99 Ky. 317, 36 S. W. 2; *In re Schulz's Estate*, 113 Mich. 592, 71 N. W. 1079; *In re Ferguson's Estate*, 138 Pa. 208, 20 Atl. 945; *In re Vance's Estate*, 141 Pa. 201, 21 Atl. 643, 12 L. R. A. 227, 23 Am. St. Rep. 267 (the wife's renunciation being regarded as equivalent to her death for the purpose of accelerating legacies); *Sherman v. Baker*, 20 R. I. 446, 40 Atl. 11, 40 L. R. A. 717.

²⁶ *Brandenburg v. Thorndike*, 139 Mass. 102, 28 N. E. 575; *Lovell v. Town of Charlestown*, 66 N. H. 584, 32 Atl. 160; *Jones v. Knappen*, 63 Vt. 391, 22 Atl. 630, 14 L. R. A. 293.

common law generally fixes the time of payment at one year after testator's death; it being presumed that such a delay affords the executor a reasonable time for determining whether the estate is sufficient to pay all debts and legacies.²⁷

The time for the payment of legacies, in the absence of determination by the will itself, is sometimes fixed by statute, the requirement being that this shall be done at the expiration of the time within which creditors may prove their claims, if there are assets sufficient for this purpose,²⁸ though ordinarily payment may be made before this time, if there are assets for the purpose, on the execution of a refunding bond by the legatees.²⁹

INTEREST ON LEGACIES

183. General legacies draw interest if not paid at the time when they are due. If this time is not fixed by the will, they ordinarily become due one year after the testator's death, and hence bear interest from that time.

184. This rule does not apply to specific legacies, the produce accruing from the subject-matter of which from the time of the testator's death belongs to the legatee, it being regarded as separated from the general estate, and appropriated to the use of the beneficiary at that time.

A demand bears interest from the time it is due. Hence interest at the legal rate is payable upon a general legacy from the time it ought to be paid until the time it is paid.³⁰ Where legacies are

²⁷ *Fitch v. Randall*, 163 Mass. 381, 40 N. E. 182; *Rotch v. Emerson*, 105 Mass. 431, 435; *Brooks v. Lynde*, 7 Allen (Mass.) 64; *Ashton v. Wilkinson*, 53 N. J. Eq. 6, 80 Atl. 895; *Walford v. Walford* (1912) 1 App. 658.

²⁸ 2 Woerner, *Am. Law of Administration*, 996.

²⁹ *Id.* The discussion of these statutes manifestly does not come within the scope of a work on Wills.

³⁰ *Hamilton v. McQuillan*, 82 Me. 204, 19 Atl. 167; *Cline v. Scott's Ex'r* (Ky.) 32 S. W. 215; *Webb v. Webb*, 92 Md. 101, 48 Atl. 95, 84 Am. St. Rep. 499 (where a legacy to grandchildren who might reach the age of 21 was held not to bear interest until that event occurred); *Von der Horst v. Von der Horst*, 88 Md. 127, 41 Atl. 124; *Loring v. Society*, 171 Mass. 401, 50 N. E. 936; *Cook v. Hayward*, 172 Mass. 195, 51 N. E. 1075 (where a legacy payable on the death of the testator's wife was held entitled to interest from the date of her death); *Ashton v. Wilkinson*, 53 N. J. Eq. 6, 227, 30 Atl. 895, 35 Atl. 1130; *Van Rensselaer v. Van Rensselaer*, 113 N. Y. 207, 21 N. E. 75 (where a legacy was given to be paid by the executors when it shall be convenient for them, without regard to the time fixed by law; held that interest should be allowed from the time when sufficient funds had been realized to pay the legacy and no possible inconvenience could result to the estate); *In re Engles' Estate*,

payable when the legatees reach a certain age and the estate is settled and the proceeds ready for distribution before that time, the legacies bear interest from the time when the estate was settled.³¹

Where the will specifies no time for payment, legacies commonly become payable one year after the death of the testator,³² and hence, if not paid, bear interest at the legal rate from that time,³³ and this though a contest over the will is pending at the expiration of that period,³⁴ or though the legacy is directed to be paid as soon as convenient,³⁵ or though, by statute, the executor has one year after the probate in which to pay,³⁶ or though the will had not been probated at the expiration of one year from the testator's death,³⁷ or though the executors are allowed a longer period in which to settle the estate,³⁸ or though the legatee die within the year and no administrator is appointed until 18 months after the expiration of the year.³⁹ Interest is not payable on a general legacy before the expiration of one year from testator's death merely because the money is invested and interest is received.⁴⁰ The rate of interest is the

167 Pa. 463, 31 Atl. 681; *Armentrout v. Armentrout* (1911) 112 Va. 660, 72 S. E. 721 (where legacies charged on remainder held to bear interest only from the termination of particular estate).

³¹ *Appeal of Provident Life & Trust Co.*, 134 Pa. 426, 19 Atl. 692. See, also, *State v. Main*, 87 Conn. 175, 87 Atl. 38 (where a grandson bequeathed a legacy payable at majority was held entitled to the accrued interest on his legacy).

³² *Ante*, p. 553.

³³ *Chambers' Guardian v. Chambers*, 87 Ky. 144, 7 S. W. 620; *In re Bartlett*, 163 Mass. 509, 40 N. E. 899; *Kingsbury v. Bazeley*, 75 N. H. 13, 70 Atl. 916, 139 Am. St. Rep. 664, 20 Ann. Cas. 1355; *Davison v. Rake*, 45 N. J. Eq. 767, 18 Atl. 752; *Marsh v. Taylor*, 43 N. J. Eq. 1, 10 Atl. 486; *Flummerfelt's Ex'rs v. Flummerfelt*, 51 N. J. Eq. 432, 26 Atl. 857; *Stout v. Stout*, 44 N. J. Eq. 479, 15 Atl. 843; *Moore v. Pullen*, 116 N. C. 284, 21 S. E. 195; *In re Elchelberger's Estate*, 170 Pa. 242, 32 Atl. 605; *Webster v. Wiggin*, 19 R. I. 653, 35 Atl. 961; *Barber v. Westcott*, 21 R. I. 355, 43 Atl. 844; *Wood v. Hammond*, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198; *Graveley v. Graveley*, 25 S. C. 1, 60 Am. Rep. 478; *In re Friend*, 78 Law T. (N. S.) 222.

³⁴ *Redd's Adm'r v. Redd* (Ky.) 58 S. W. 428; *Powell v. Drake*, 19 D. C. 334; *WOODWARD'S ESTATE v. HOLTON*, 78 Vt. 254, 62 Atl. 718, 6 Ann. Cas. 524, *Dunmore Cas. Wills*, 319 (applying general rule, although contest participated in by legatee now claiming interest). *Contra*: *Good Samaritan Hospital v. Mississippi Valley Trust Co.* (1909) 137 Mo. App. 179, 117 S. W. 637.

³⁵ *Griggs v. Veghte*, 47 N. J. Eq. 179, 19 Atl. 867.

³⁶ *Davison v. Rake*, 44 N. J. Eq. 506, 16 Atl. 227.

³⁷ *Ogden v. Pattee*, 149 Mass. 82, 21 N. E. 227, 14 Am. St. Rep. 401.

³⁸ *In re Spencer*, 16 R. I. 25, 12 Atl. 124; *Warwick v. Ely*, 59 N. J. Eq. 44, 44 Atl. 666.

³⁹ *Esmond v. Brown*, 18 R. I. 48, 25 Atl. 652 (it being the duty of the executors under such circumstances to invest the legacy in some interest bearing fund).

⁴⁰ *Thayer v. Paulding*, 200 Mass. 98, 85 N. E. 868.

legal rate,⁴¹ irrespective of the rate which safe investments will produce,⁴² but interest will not be compounded.⁴³ Sometimes, by virtue of statute, interest on legacies begins to run one year after the grant of letters testamentary.⁴⁴

Where the income of a fund is directed to be paid to a beneficiary, he is entitled to interest thereon from the death of the testator, in the absence of an intent of the testator to the contrary.⁴⁵

Specific Legacies

Specific legacies are not subject to the general rule, for the reason indicated in the black-letter text. Such a legatee is entitled to whatever income or interest the property bequeathed may produce from the time of the testator's death,⁴⁶ and to accrued interest in arrears at that time on securities specifically given.⁴⁷

Further Exceptions

Where a legacy is given to a minor child or to a minor to whom the testator stood in loco parentis, for whose support no provision is made by the will, interest upon the legacy will be allowed from the time of the testator's death, as a provision for maintenance, regardless of the time at which the legacy itself is payable.⁴⁸ The rule does not apply to a bequest to an adult child, though he had

⁴¹ In re Watt's Estate, 168 Pa. 422, 32 Atl. 42. But where a fund remains in a bank by the consent of the beneficiary, pending the decision of a suit for the construction of the will, he is entitled to no greater rate of interest thereon than is allowed the executor by the bank. Foster v. Wetmore, 60 Hun, 577, 14 N. Y. Supp. 194.

⁴² Welch v. Adams, 152 Mass. 74, 25 N. E. 34, 9 L. R. A. 244; Loring v. Society, 171 Mass. 401, 50 N. E. 936.

⁴³ Welch v. Adams, supra.

⁴⁴ Lewis v. Barkley (1912) 91 Neb. 127, 135 N. W. 879; In re McGowan, 124 N. Y. 526, 26 N. E. 1098; Moorman v. Crockett, 90 Va. 185, 17 S. E. 875. Or, in one year after date of the notice of the appointment of the executor. Gray v. Case School of Applied Science, 62 Ohio St. 1, 56 N. E. 484.

⁴⁵ Mackay v. Mackay, 107 Cal. 303, 40 Pac. 558; In re Catron's Estate, 82 Mo. App. 416; Corle v. Monkhouse, 47 N. J. Eq. 73, 20 Atl. 367; In re Stanfield, 135 N. Y. 292, 31 N. E. 1013; In re Flickwir's Estate, 136 Pa. 374, 20 Atl. 518; Chafee v. Maker, 17 R. I. 739, 24 Atl. 773.

⁴⁶ Graybill v. Warren, 4 Ga. 528; Smith v. McKitterick, 51 Iowa, 548, 2 N. W. 390; Blundell v. Pope (N. J. Ch.) 21 Atl. 456; Smith v. Lansing, 24 Misc. Rep. 566, 53 N. Y. Supp. 633.

⁴⁷ Fleming v. Carr, 47 N. J. Eq. 549, 22 Atl. 197; In re Mowry, 16 R. I. 514, 17 Atl. 553; Harcourt v. Morgan, 2 Keen, 274, 15 Eng. Ch. 274, 48 Eng. Reprint, 633.

⁴⁸ Flinn v. Flinn, 4 Del. Ch. 44; Webb v. Webb, 92 Md. 101, 48 Atl. 95, 84 Am. St. Rep. 499; Doten v. Doten, 66 N. H. 331, 20 Atl. 387; Marsh v. Taylor, 43 N. J. Eq. 1, 10 Atl. 486; In re Keech's Estate, 240 Pa. 491, 87 Atl. 623; Couch v. Eastham, 29 W. Va. 784, 3 S. E. 23.

always been supported by the testator,⁴⁹ nor where other provision is made for the support of the beneficiary,⁵⁰ nor to a minor grandchild,⁵¹ or nephew or niece,⁵² unless the testator stood in loco parentis to them.

A legacy given in satisfaction of a debt bears interest from the testator's death.⁵³ In some jurisdictions, a widow, given a legacy in lieu of dower, is entitled to interest from testator's death, if no other means for her support are provided;⁵⁴ but in England and in the greater number of the United States such a legacy does not bear interest until one year from the death of testator.⁵⁵

TRANSFERS BY LEGATEES AND DEVISEES

185. In the absence of any provision in the will to the contrary, a legatee may assign or a devisee convey his interest under the will, and the usual doctrines respecting assignments and conveyances apply.

The interest of a legatee under a will may be assigned,⁵⁶ and such assignment may be by parol,⁵⁷ in the absence of a statute to the contrary. The assignee takes all the rights of the assignor, and may ordinarily assert them in his own name.⁵⁸ Any set-off available against the assignor is also available as against the assignee.⁵⁹

⁴⁹ *Thorn v. Garner*, 113 N. Y. 198, 21 N. E. 149.

⁵⁰ *In re Clark*, 62 Hun, 275, 17 N. Y. Supp. 93.

⁵¹ *Marsh v. Taylor*, 43 N. J. Eq. 1, 10 Atl. 486; *In re Goble's Will* (Sur.) 10 N. Y. Supp. 18; *In re Todd's Estate*, 237 Pa. 466, 85 Atl. 845, 43 L. R. A. (N. S.) 869.

⁵² *Crickett v. Dalby*, 3 Ves. 10; *Lyon v. School Ass'n*, 127 N. Y. 402, 28 N. E. 17.

⁵³ *Welsh v. Brown*, 43 N. J. Law, 37; *Clark v. Sewell*, 3 Atk. 96, 26 Eng. Reprint, 858.

⁵⁴ *Pollard v. Pollard*, 1 Allen (Mass.) 490; *Welch v. Adams*, 152 Mass. 74, 25 N. E. 34, 9 L. R. A. 244.

⁵⁵ *In re Barnes' Estate*, 7 App. Div. 13, 40 N. Y. Supp. 494 (affirmed in *Barnes v. Barnes*, 154 N. Y. 737, 49 N. E. 1093); *Howard v. Francis*, 30 N. J. Eq. 444; *Gill's Appeal*, 2 Pa. 221; *In re Bignold*, 45 Ch. D. 496.

⁵⁶ *People's Trust Co. v. Harman*, 43 App. Div. 348, 60 N. Y. Supp. 178; *Sanders v. Soutter*, 136 N. Y. 97, 32 N. E. 638; *In re Martin's Estate*, 178 Pa. 416, 35 Atl. 989; *Whelen v. Phillips*, 151 Pa. 312, 25 Atl. 44; *Appeal of Mendenhall*, 151 Pa. 214, 25 Atl. 44; *In re Luscombe's Will*, 109 Wis. 186, 85 N. W. 341.

⁵⁷ *Mellon v. Reed*, 123 Pa. 1, 15 Atl. 906.

⁵⁸ *Graham v. Abercrombie*, 8 Ala. 552; *In re Phillips*, 71 Cal. 285, 12 Pac. 169. The matter depends entirely upon statute, however.

⁵⁹ *Ford v. O'Donnell*, 40 Mo. App. 51; *Hopkins v. Thompson*, 73 Mo. App. 401.

Executors having notice of an assignment of a legacy which shows on its face that it is given as security for the payment of a note "with interest," the rate not being stated, are put on inquiry as to the rate, and cannot escape liability for the interest on the ground that they had no notice of the rate.⁶⁰

So a devisee, whose interest is not a mere expectancy,⁶¹ but who takes an estate in the property devised, may alienate it before it vests in possession,⁶² although devisee's estate is subject to be defeated by the happening of a condition subsequent.⁶³ A provision that none of the real estate devised shall be sold until the youngest beneficiary becomes of lawful age does not prohibit a devisee from selling his undivided interest at any time, the purchaser becoming a tenant in common with the other devisees.⁶⁴ Where a statute provides that no will shall operate to pass title to real estate until duly probated, a conveyance without warranty by a devisee before the probate of the will is ineffective to pass title to property subsequently acquired under the will by virtue of its probate, and such title may be asserted by the devisee as against his grantee.⁶⁵ But where the statute does not postpone vesting until the probate of the will, a conveyance by a devisee before probate conveys a title which may be asserted upon the subsequent probate of the will.⁶⁶

EFFECT OF A LEGACY GIVEN BY CREDITOR TO DEBTOR

186. A legacy given by a testator to his debtor is not an extinguishment of the debt, unless the intention of the testator to that end is clearly manifest.

The full extent of the testator's bounty is supposed to be disclosed by the will. Hence a legacy to a debtor does not include, in addition thereto, a gift of the debt unless his intention to that end is entirely clear.⁶⁷ This intention may be manifested by express

⁶⁰ *McKie v. Gregory*, 175 Mass. 505, 56 N. E. 720.

⁶¹ *Cassem v. Kennedy*, 147 Ill. 660, 35 N. E. 738.

⁶² *Heise v. Wells*, 211 N. Y. 1, 104 N. E. 1120; *Sayles v. Best*, 140 N. Y. 368, 35 N. E. 636; *Griffin v. Shepard*, 124 N. Y. 70, 26 N. E. 339; *In re Valentine*, 59 Hun, 619, 13 N. Y. Supp. 444.

⁶³ *Newlove v. Mercantile Trust Co.*, 156 Cal. 657, 105 Pac. 971.

⁶⁴ *Roederer v. Hess*, 112 Ky. 807, 66 S. W. 1012.

⁶⁵ *Douglass v. Miller* (Com. Pl.) 4 Ohio Dec. 414.

⁶⁶ *Boothe v. Cheek*, 253 Mo. 119, 161 S. W. 791.

⁶⁷ *Leask v. Hoagland*, 64 Misc. Rep. 156, 118 N. Y. Supp. 1035; *Sharp v. Wightman* (1903) 205 Pa. 285, 54 Atl. 888; *In re Bally's Estate*, 153 Pa. 402,

words⁶⁸ or by necessary implication,⁶⁹ and parol evidence is sometimes admitted to prove the intention of testator to forgive a debt due from a legatee.⁷⁰ Where one of two co-sureties left a legacy to the other, who assigned it, and the estate of the deceased surety was afterwards compelled to pay the whole amount of the bond, the right to set off against the legacy one-half the amount of the bond was held to be an equity existing even before payment thereof by the executors, and hence the assignee took the legacy subject to such right of set-off.⁷¹

ESTOPPEL OF BENEFICIARIES TO CONTEST THE WILL

187. Beneficiaries who receive and retain property and benefits under a will with full knowledge of all material facts are thereby estopped to deny or contest it.

188. No estoppel results against the beneficiaries for their failure to present the will for probate and to assert their rights thereunder, when such failure is due to ignorance of its existence.

The rule with regard to the effect of the acceptance of benefits under a will is but an instance of the application of the general doctrines of estoppel, and is steadily recognized.⁷² Thus where a

26 Atl. 23; *Spath v. Zeigler*, 48 La. Ann. 1168, 20 South. 663; *Bowen v. Evans*, 70 Iowa, 368, 30 N. W. 638.

⁶⁸ *Taylor v. Taylor*, 145 Mass. 239, 14 N. E. 101; *Neville v. Dulaney's Ex'rs*, 89 Va. 842, 17 S. E. 475; *Waterman v. Alden*, 143 U. S. 196, 12 Sup. Ct. 435, 36 L. Ed. 123.

A clause in a will, "My executors may, in their discretion, cancel the mortgages held by me" upon certain lands, does not amount to a discharge of such mortgages, but leaves the matter wholly to the discretion of the executors. *Moss v. Lane*, 50 N. J. Eq. 295, 23 Atl. 481.

⁶⁹ *Sorrelle's Ex'rs v. Sorrelle*, 5 Ala. 245, 248; *Woodruff v. Migeon*, 46 Conn. 236; *Baldwin v. Sheldon*, 48 Mich. 580, 12 N. W. 872.

⁷⁰ *Bromley v. Atwood*, 79 Ark. 357, 96 S. W. 356; *Zeigler v. Eckert*, 6 Pa. 18, 47 Am. Dec. 428 (admitting evidence of testator's declarations).

⁷¹ *In re Bally's Estate*, 156 Pa. 634, 27 Atl. 560, 22 L. R. A. 444.

⁷² *KEYS v. WRIGHT*, 156 Ind. 521, 60 N. E. 309, *Dunmore Cas. Wills*, 321; *Medill v. Snyder*, 61 Kan. 15, 58 Pac. 962, 78 Am. St. Rep. 307; *Medlock v. Merritt*, 102 Ga. 212, 29 S. E. 185; *Madison v. Larmon*, 170 Ill. 65, 48 N. E. 556, 62 Am. St. Rep. 356; *Bennett v. Bennett (Ky.)* 65 S. W. 12; *Green v. Ponder (Ky.)* 58 S. W. 605; *In re Walkerly's Estate*, 108 Cal. 627, 41 Pac. 772, 49 Am. St. Rep. 97. It finds its most common application in cases of election. See ante, p. 539.

The fact that legacies were received under protest does not prevent the es-

father devised certain lands to each of his children, and each accepted the devise made to him, they are each estopped from thereafter claiming that the tract devised to one child belonged to their mother, and that each inherited an equal share therein at her death.⁷³

Where a will is not probated for seven years after the testator's death, and in the meantime the heir had taken possession of the testator's land and given a mortgage thereon, the devisees are not estopped to claim the land as against the mortgagee, in view of the fact that they were ignorant of the existence of the will.⁷⁴

toppel of legatees. *Stone v. Cook*, 179 Mo. 534, 78 S. W. 801, 64 L. R. A. 267, 9 Prob. Rep. Ann. 453.

⁷³ *Buchanan v. McLennan*, 192 Ill. 480, 61 N. E. 448.

⁷⁴ *Reid's Adm'r v. Benge*, 112 Ky. 810, 66 S. W. 997, 57 L. R. A. 253, 99 Am. St. Rep. 334.

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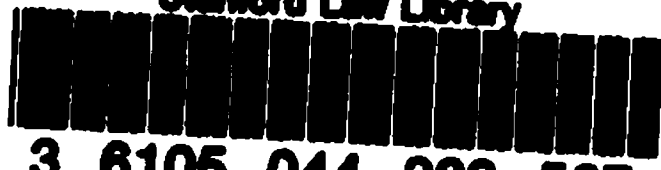
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